AFRICAN HANDBOOKS: 1

The Government of French North Africa

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Edited by H. A. WIESCHHOFF

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THE GOVERNMENT OF FRENCH NORTH AFRICA

By

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FOREWORD

WITH this volume the African Section of the University Museum of the University of Pennsylvania in collaboration with the Committee on African Studies inaugurates a publication series to be called "African Handbooks," which is designed to offer studies of the African continent and its inhabitants.

The present world struggle, as well as the period which will follow the victorious conclusion of this war, makes it mandatory that Americans are informed about those regions of the world to which in the past we have given but scant attention. We have to be aware that Africa is no longer the continent in which to meet savage tribes and strange adventures, but that, to the contrary, it is economically, socially, and politically an integral part of the world.

In order to pursue research in the many scientific disciplines, the Committee on African Studies at the University of Pennsylvania was formed and is now actively engaged in gathering and analyzing data which will be published in this series covering a wide range of subjects dealing with botanical, geological, legal, and anthropological subjects.

At the moment when the first volume goes to press it gives us much pleasure to acknowledge gratefully the financial support of the Rockefeller Foundation as well as that of the American Council of Learned Societies without which the development of African Studies at the University of Pennsylvania would not have been possible.

H. A. WIESCHHOFF

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CONTENTS

ABBREVIATIONS

A.F.: *L'Afrique française, Bulletin mensuel du Comité de L'Afrique française et du Comité du Maroc.*

Cass.: Decision of the Court of Cassation.

D.P.: *Recueil périodique et critique,* published by Dalloz (cited with year, part, and page).

B.O.M.: *Bulletin officiel du Maroc.*

Girault-Milliot, *L'Algérie:* A. Girault and Louis Milliot, *Principes de colonisation et de législation coloniale, L'Algérie,* 7th edition, Paris, 1938.

Girault-Milliot, *La Tunisie et le Maroc:* A. Girault and Louis Milliot, *Principes de colonisation et de législation coloniale, La Tunisie et le Maroc,* 6th edition, Paris, 1936.

J.O.E.F.: *Journal officiel de l'Etat français.*

J.O.R.F.: *Journal officiel de la République française.*

J.O.T.: *Journal officiel tunisien.*

R.A.: *Revue algérienne, tunisienne et marocaine de législation et de jurisprudence.*

INTRODUCTION

The victorious campaign of American, British, and French armies in North Africa has turned the spotlight of world attention upon a region of the globe which had hitherto been largely a forgotten land. Morocco, Algeria, and Tunisia, the three territories forming French North Africa, were, at best, known as tourists' countries, renowned only for their strange and quaint people who are still faithfully adhering to exotic and biblical ways of life. In general, little attention had been attributed to these countries which, it appears, had been by-passed by the intricate events of the world's political and economic affairs. Only seldom was this area, in which desert *sheiks* and oriental rulers held forth, engulfed in the diplomacy of the world's great powers.

Every American is, of course, familiar with our young country's fight for the freedom of the sea when it defended this right against the pirates of the Barbary States, as French North Africa was called in the early part of the last century, and it is in memory of this campaign that our Marines refer in their song "to the shores of Tripoli."

Of world-shaking effect was the Moroccan crisis of 1912 which brought about the stage setting for World War I; and some of us will remember the wars of the Rif-Kabyles, this struggle of the rugged mountaineers under their leader Abd-el-Krim against the Spaniards and the French in the early 1920's. Only sporadically was the world audience invited to look behind the political curtain that enveloped the Mediterranean shores of the African continent. When the Italians, prior to the outbreak of the present war, began to demand the annexation of Nice, Corsica, and Tunisia, the latter was hardly more than a geographical term to most of us.

The French, who since the beginning of the last century had gradually annexed the North African region and had initiated its economic and commercial development, prized their possessions very highly and regarded the three North African territories as the jewel of their far-flung colonial empire, and embarked early upon a colonial development which made the mother country greatly dependent on those areas. The great importance which the Vichy government of Pétain attached to its North African possessions, potentially rich in agricultural and mineral

resources as well as in native manpower, is still fresh in our memory. France, with a declining population, needed more than any other colonial power its colonies' wealth and counted particularly on North Africa in order to make up for the depletion of its resources at home.

Thus, when in the morning hours of November 8, 1942, news of the landing of American and British troops was flashed around the globe, the French dependencies of North Africa, largely unknown even to the average Frenchman, suddenly loomed very prominently on the horizon of the military developments of World War II. Six months of fighting, crowned by the Tunisian victory, have now cleared North Africa of Axis troops and have incorporated this area into the realm of the United Nations. These short months of military operations have come to be regarded as the turning point of the war itself. While now the debris of battle is being cleared away and while we prepare ourselves for a new campaign on the road to victory, we have time to investigate some of the political issues which accompanied the military struggle for North Africa.

Darlan, Giraud, De Gaulle, Nogués, Peyrouton—these are a few of the names which have kept our attention while the campaign itself was offering short breathing spells. It is not the purpose of this book to unravel the immediate political problems underlying the numerous controversies between these men, nor is it the task of this study to deal with those political ramifications which are concerned with the reconstruction and rebirth of France herself. Discussions of such a nature have been reviewed in too many articles and contributions in the daily and periodical press. The following account of the government of French North Africa will offer the legal basis for these political discussions and has, moreover, as its goal the unprejudiced report of the administrative and legal organization of the French possessions of North Africa. In view of the numerous speculations and explanations concerning the political issues of North Africa, such a study was mandatory, particularly since the administrative organization is more complex and intricate than those which we normally encounter.

For a complete comprehension of the administrative problems as they are presented in the following chapters, it is necessary to outline briefly the ethnic and population distribution in the region under review, particularly since the ethnic situation is rather

involved and since it accounts, partially at least, for the complicated governmental apparatus with which the reader will be familiarized in the following chapters.

The population of all three territories is normally subdivided into two major categories, namely Europeans and native Africans, or, as the French classify the latter, "Musulmans" for Morocco and Tunisia, and "French subjects" for Algeria. The native Africans, who, for the greater part, are Moslems, are either of Berber or Arabian origin. The Berber are regarded as the autochthonous population and inhabit the more inaccessible mountain regions of the three territories where their aboriginal tribal organization has been kept largely intact. The Arabs, on the other hand, are more recent invaders who, beginning at the end of the seventh century A.D., conquered the Mediterranean littoral of the African continent and from there gradually infiltrated adjacent areas. In many instances it will be difficult to draw distinct lines of demarcation between these two ethnic groups. More than a thousand years of religious, social, political, and cultural intercourse and interchange have eliminated many distinctions which existed previously. In general it may be stated that the Berbers tend to be sedentary and the Arabs nomadic or semi-nomadic, but even in respect to their mode of life no clear-cut distinction can be made.

Out of a total of 16,083,918, according to the 1936 census, 14,456,161 persons are classified as native African. Since the year of the last census (1936) the total population of Algeria, Tunisia, and Morocco has increased considerably and at the close of 1942 was estimated as 17,752,000, with the number of native Africans having increased to about 15,000,000. Morocco is the territory with the highest native population, namely 94 per cent of the total. Tunisia is 90 per cent native, and in Algeria only 85 per cent of the total population is regarded as of native origin. Of the total native population, about 5,500,000 persons speak the native Berber language, and almost half of them live in Morocco (about 3,000,000), while about 2,000,000 inhabit the Kabyle region of Algeria, the remainder being scattered over Tunisia. Arabic is spoken by almost 14,000,000, a fair number of non-Arabs and non-natives being familiar with this tongue. In evaluating the number of speakers of these two languages, it has to be kept in mind that many of the native North Africans are acquainted with both languages.

A special ethnic status has to be accorded to the Jewish population of French North Africa, their position being somewhat between that of the native African and that of the European population. In Algeria the Jews have equal status with the Europeans and are included among French citizens, as will be learned in the following chapters, and as a result of their legal position are no longer enumerated as a distinct minority. For that reason population figures for Algeria are difficult to obtain. Official calculations estimate persons of Jewish descent at 180,000. The total for the whole of French North Africa, depending of course on the Algerian estimate, is about 400,000.

The Jews settled in North Africa long before the arrival of the Arabs, the first having reached North Africa as early as the tenth century B.C., accompanying the Phoenicians when they established their North African trading posts. All through the first millenium B.C., Jewish immigrants reached North Africa by circuitous routes, and many of the present North African Jewish population trace their origin to these early immigrants. The bulk of Jews appear to have arrived, however, from Spain, not only following the Spanish Edict of Expulsion in 1492, which brought about mass immigrations, but also long before that time; Jewish immigration from Spain may be said to have begun in the seventh century A.D. The last important influx of Jews occurred at the beginning of the sixteenth century when many Italian Jews, particularly of the Leghorn area, left their homeland under the pressure of the Inquisition. It may be noteworthy to mention that many of the descendants of this latter group have made important contributions to the intellecual life of the North African territories.

It is obvious, of course, that a group as heterogeneous in origin as the Jews of North Africa cannot be regarded as a specific ethnic group. As a result of social pressure exerted by Arabs and later by Europeans, they were forced to live in partial social isolation. This fact and the common bond of religion accounts for the clannishness which is proverbial among the North African Jews.

Among the Europeans proper, three groups of different national origin have to be distinguished, namely, the French, Spaniards, and Italians. Naturally the French form the most numerous group of officials, merchants, small and large landholders, and, except for Tunisia, form practically the only European group. Spaniards who settled in western Algeria long before the French occupation (although holding themselves aloof from

the political problems affecting the North African territories) are gradually disappearing, partially because they are absorbed by the French lower middle class and partially as a result of a declining population.

Of greater political importance is and was the Italian population of Tunisia, since this minority group under Fascistic pressure policy was utilized for the policy of aggrandizement and annexation pursued by the Italian Fascistic state. The Italians, a conglomerate mixture mostly of South Italian peasant origin, were for a long time the numerically predominant European group, which was, however, numerically overtaken in 1931 as a result of a persistent French naturalization campaign. Although the Italians were outnumbered in the 1936 census by some 15,000, their political influence remained powerful not only on account of the political support which they received from Rome, but also because they formed a homogeneous block which was opposed only by a heterogeneous group of French citizens which, in itself, was composed of Frenchmen of France, Frenchmen born in the colonies, naturalized Jews and Italians, Maltese, and others.

In the development of a more uniform ethnic European bloc, the French were permanently hindered by international agreements between France and Italy regulating the citizenship status of the Tunisia-born Italians. Because of diplomatic considerations France was prevented from pursuing a vigorous naturalization policy, and was forced to make concessions which hindered the undisturbed development of the difficult Tunisian population problem. (For details see p. 65.)

Both in the interest of the peaceful development of Tunisia after the war and in the interest of the great majority of the Italian population which was drawn into this international dispute as helpless tools of an extreme nationalistic regime, it may be hoped that a permanent settlement will be found.

If this hope may be stated for the comparatively small Italian minority, it may be expressed more justifiably regarding the large Moslem majority of the three territories, particularly for the 12,000,000 or 13,000,000 native Africans in the two protectorates of Morocco and Tunisia. We must be aware of the fact that many of the educated Arabs and Berbers will insist on a fair interpretation of the Atlantic Charter, with the contents of which they are fully acquainted. While at the present time the trend toward Arab nationalism in North Africa is not as highly developed as in other Islamic countries of the Near East, nationalistic

parties, such as the *Destour,* have increased their activities considerably, and some factions of these parties have expressed vigorous anti-French tendencies. In view of these developments and in the desire for a lasting peace, it may be hoped that the new France will give due consideration to the legitimate aspirations of those who, as colonial subjects of France, have so greatly contributed to the welfare of European France.

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Population of French North Africa

(according to the 1936 census report)

Territory	*Total*	*Natives*	*French*	*Jews*	*Italians*	*Maltese*	*Spanish*
Algeria	7,234,684	6,247,432	853,209	*	20,929	2,976	91,942
Morocco	6,240,921	5,873,106	118,343	161,309	14,038		19,723
Tunisia	2,608,313	2,335,623	108,068	59,505	94,289	7,279	323
Total	16,083,918	14,456,161	1,079,620	220,814	129,256	10,255	111,988

* Numbered with the French.

Speakers of Arabic and Berber Languages in French North Africa

	Arabic	*Berber*
Algeria	5,890,000	2,100,000
Morocco	5,270,000	2,900,000
Tunisia	2,575,000	500,000

Chapter I

ADMINISTRATION OF THE AFRICAN DEPENDENCIES

INTRODUCTION

The North African territories under French control present a considerable variety in their governmental and administrative procedure. Basically two groups may be distinguished. Algeria, situated directly across the Mediterranean from metropolitan France, was occupied as early as 1830 and was annexed in 1834. Consequently the native government there was completely abolished. Algeria has very close connections with the mother country, and its position may be defined as being somewhere between a colony and a part of the metropolitan territory. That is, the relations are closer than those of the ordinary colonial possessions but not quite close enough to make Algeria in every respect equivalent to a part of metropolitan France. Tunisia and Morocco, on the other hand, were occupied but not annexed by France. In both cases treaties were concluded with the native rulers which established French protectorates over the two countries. A certain measure of native self-government, at least in form, was thereby retained.

There are no colonies in the technical sense in French North Africa. Where institutions peculiar to the administration of the colonies proper have been mentioned on the following pages, this has been done in order to show the mechanics of the central administration of overseas possessions as a whole. The languages officially used in the French North African territories are French and Arabic. Where Arabic terms have been applied here, the transcription used in the official French documents has been followed as a rule, even though it may differ from the scientific transcription, in order not to complicate the use of the French sources.

PRINCIPLES OF LEGISLATION

In the legislation for overseas possessions, three basic principles may be distinguished.

One is that most of the legislation for the dependencies is enacted in the mother country by the metropolitan legislative

organs. Only some supplementary legislation is enacted in the possession itself. This system might be termed "legislative centralization" and is employed by France for most of her overseas territory. It is the system prevailing for Algeria.

Under the second type of legislative procedure, most of the legislation is enacted in the dependency itself. This is the method used in Tunisia and Morocco. The ordinary legislator is the native sovereign, with only some legislation emanating directly from the French government. However, the local ruler is under strict French control and the preparation, as well as the promulgation, of the enactments is in French hands. An autonomous development of the legislation in these two territories is thus ruled out.[1] This system may be termed "legislative decentralization."

The third system provides for the creation of a representative legislative body in the possession.[2] In this case internal self-government becomes a reality though the veto right of the metropolitan government may still exist in some instances. In Africa this system is not employed in any of the French possessions. It is, however, used by the British in Southern Rhodesia. The system may be called "legislative autonomy."

It is a further characteristic of the legislation for dependencies that the part enacted in the mother country often emanates from the executive and not from the legislative branch of government. That means that this legislation is not subject to parliamentary action but may be enacted by an order of the chief executive. The practical advantages of this method are that it permits the administration to introduce necessary measures more speedily and to avoid the often cumbersome parliamentary procedure. Abuse of this power is prevented by the system of cabinet government which prevailed in France. Under this system the government is responsible to the legislature, which may take either the whole government or an individual minister to task with regard to any action. Through the means of a vote of non-confidence, the legislative body can force the government out of office. The bills

[1] Because of this strict supervision by the French government one can, in my opinion, hardly speak of legislative autonomy even though the legislation is formally enacted in the territory by the native sovereign.

[2] A representative legislative assembly may be defined as one in which at least half of the members are elected and which has general legislative powers. The various councils that exist in the French North African possessions do not have general legislative powers.

dealing with legislation for the overseas possessions are prepared for the President by the Minister of the Colonies or any other cabinet member competent in the special case. The Parliament can thus hold the respective minister responsible for the policy as followed by the administration with regard to the dependencies. Some important legislative acts are usually reserved outright for parliamentary approval. The borders between executive and parliamentary legislation for dependencies are well defined in Belgium and Portugal.[3] In France as well as in Britain no fixed boundaries exist.

In countries which have a parliamentary system of government, as Britain and pre-war France, the legislative power rests basically with the Parliament. Extensive legislative powers of the executive with regard to the dependencies are the exception not the rule. They constitute an infringement of the supreme legislative rights of the Parliament and have to be legally justified. In Great Britain this justification is afforded by the so-called royal prerogative which allows the King to enact legislation for the colonial possessions.[4] It is there that a vestige, so to speak, of the unlimited royal legislative rights as they had existed before the British Parliament came into being is still preserved. France, on the other hand, was a republic and the President had never had any original unrestricted power to legislate. What legislative powers he did have were therefore based upon express or tacit delegation from the French Parliament.

THE FRENCH LEGISLATIVE ORGANS FOR THE OVERSEAS POSSESSIONS

Normal Peacetime Legislation

Although the legislative machinery has undergone profound changes since the fall of France, it is pertinent to outline the legislative procedure as it existed in peacetime before treating the later changes. In many respects this earlier legislation continues to form the basis for the enactments introduced since the fall of the mother country; and the declaration of General Giraud

[3] In the so-called Colonial Charter of 1908 as far as Belgium is concerned. In Portugal new basic legislation for the colonial empire was enacted in 1933, the *Acte colonial* (first published in 1930) and the *Carta orgânica do império colonial Português.*

[4] A. B. Keith, *Governments of the British Empire,* London, 1935, pp. 295–96, 466 ff.

of March 14, 1943, to adhere to the principles of the Third Republic tends to increase its importance.

It was stated above that France, as a principle, followed the system of legislative centralization for most of its overseas possessions with the exception, in the case of North Africa, of Tunisia and Morocco. However, even for these territories some legislative acts emanate directly from the French central governmental authorities. This is the case primarily where the matter regulated by the enactment concerns exclusively French institutions in the protectorate, as, for example, the armed forces or the control organs.

As stated, under the Third Republic the central legislative enactments for the overseas possessions took either the form of laws passed by the French Parliament or, more frequently, of presidential decrees. The delegation of legislative power by the Parliament to the President was, in France, not accomplished by a single legislative act. As a matter of fact the legal basis for this delegated power of the executive is none too clear. There are three enactments which play an important role in this respect. They are the *sénatus-consulte* (act of the Senate) of May 3, 1854, for the colonies in the technical sense; the law of April 24, 1833 and the royal ordinance of July 22, 1834, for Algeria. The basis for the legislative power of the President of the Republic with regard to the two protectorates, Tunisia and Morocco, has to be sought in the constitution of the Third Republic of 1873 and in constitutional custom.

The law of April 24, 1833, had tried to establish a clear-cut division in regard to colonial legislation between the provinces of the law and of the royal ordinances, as the executive decrees were then called. Its regulations, however, were not all-inclusive. It set up a special regime for only some of the possessions and expressly stipulated that Algeria, together with the rest of the African possessions, should remain under the rule of royal ordinances in all respects. This principle was reiterated by the royal ordinance of July 22, 1834. Thus the King had the power to enact for Algeria all the legislation he held necessary without referring to the legislative assembly. The French constitution of 1848, which established the Second Republic, tried to change this state of affairs by instituting a new regime of legislation by special laws for Algeria (art. 109). This constitution was short-lived, however, and under the Second Empire there was a complete reversion to the rule by executive decree based upon the law of

1833 and the ordinance of 1834. This state of affairs survived the fall of the Empire and continued down to the present.[5]

The endeavors to define clearly the spheres of law and decree in the legislation for overseas possessions had not been confined to the July Monarchy, which had produced the law of 1833, and to the constitution of 1848. The constitution of 1852, establishing the Second Empire, contained the programmatical point that the Senate should enact basic legislation dealing especially with this problem for the possessions. Little was done, however. As has been seen, one reverted to the law of 1833 as far as Algeria was concerned. For the rest of the overseas possessions, the Senate made some provisions in the *sénatus-consulte* of May 3, 1854. This enactment set up special rules for only part of the possessions, namely the Antilles (Martinique and Guadeloupe) and Réunion. It defined which matters were reserved for parliamentary approval and which cases could be dealt with by executive decree. As for the colonies outside the Antilles and Réunion, the *sénatus-consulte* foresaw a second enactment which should define the spheres of law and decree. Until the passage of this second *sénatus-consulte* these colonies were to be left under the rule of decrees in all matters. No such act was ever passed, and the Emperor was therefore not restricted in his legislative power with regard to the colonial possessions except the Antilles and Réunion. After the fall of the Second Empire in 1870 and the establishment of the Third Republic, the President continued to exercise the decree powers which the Emperor had held before with regard to the overseas possessions. The question was raised

[5] It was debated at length whether the constitution of 1848 had completely abrogated the decree powers of the chief executive and on what legal basis they were brought back into being. It was argued that the rule of the law of 1833 was interrupted by the constitution of 1848 but that it was revived after the repeal of this constitution in 1852. (Cf. the note of Cazalens to *Cass.*, Dec. 10, 1879, *D.P.* 1880.1.282.) Girault-Milliot, *L'Algérie*, 7th ed., Paris, 1938, p. 227, point out that, in practice, decrees for Algeria continued to be enacted under the constitution of 1848 and that therefore this type of rule was never really interrupted. The older opinions have been thoroughly discussed by Hans Gmelin, "Die Verfassungsentwicklung von Algerien," *Abhandlungen des Hamburgischen Kolonialinstituts*, Hamburg, I (1911), 137–38. Gmelin himself has a purely legalistic attitude and believes that the decree power of the President as far as Algeria is concerned has to be regarded as unconstitutional. There is no need to enter into a discussion of legal subtleties; French theory and practice have always recognized this decree power of the President, and if one is not willing to accept any of the theories advanced in its justification one would still have to accept it as a constitutional custom sanctioned by long unopposed usage.

by writers on theory of government whether this power could still be based upon the *sénatus-consulte* of 1854. It would lead too far to discuss the arguments for and against the continued validity of this act.[6] It will suffice to state that the decrees of the President were expressly based upon this *sénatus-consulte* as far as colonies in the technical sense were concerned, and that the French courts have consistently upheld the view of the continuance of this enactment.

Despite the constitutional changes after the fall of France in 1940, the enactments just discussed continue to be regarded as the bases for the decree legislation for Algeria and the colonies. This is true of the French National Committee in London as well as of the provisional governmental body established in Algiers.

As far as the decree power of the executive for the two protectorates in North Africa is concerned, no enactment exists on which it might be based. The *sénatus-consulte* of 1854, which had stated that all colonies except Antilles and Réunion should remain under the rule of decrees, could not be applied since the protectorates are not colonies in the technical sense.[7] The opinions of French theory and practice differ with respect to this decree power for the protectorates. One school of thought maintains that it had its basis in the French constitution of 1875 which, in article 8, gave the President the right "to negotiate and ratify treaties." [8] Others have pointed out that this article could not apply since the treaties establishing the protectorates were not ratified by the President but by the French Parliament. They believe that the decree power of the President in these instances must be based either upon a tacit delegation by the Parliament or upon constitutional custom.[9] The courts have not followed a straight line in their decisions but have sought to base the presidential power on any one of these theories.[10]

[6] They are discussed in detail by A. Bienvenu, "Le législateur colonial," *Revue du droit public et de la science politique en France et à l'étranger*, XLVI (1929), 224–42.

[7] Cf. Pierre Lampué, "Le régime législatif des pays de protectorat," *Revue du droit public et de la science politique en France et à l'étranger*, LVI (1939), 23.

[8] Cf. *Ibid.* See also Camille Fidel, "Les institutions politiques et administratives du Maroc," *Organisation politique et administrative des colonies*, Brussels, 1936, p. 514.

[9] Girault-Milliot, *La Tunisie et le Maroc*, 6th ed., Paris, 1936, p. 35, n. 1, and p. 278, n. 2.

[10] Lampué, *op. cit.*, p. 23.

The constitutionality of the decree power as such has never been seriously questioned.

The decrees to be enacted by the President were prepared by the staffs of the respective ministries, that is, by the Ministry of the Interior for Algeria, the Ministry of Foreign Affairs for the two protectorates, and the Ministry of the Colonies with regard to the colonies. Other ministries collaborated if the subject matter of the decree touched their domain. For example, the Ministry of Justice was consulted in instances concerning the judicial administration. More important enactments were usually submitted to the President with a covering letter outlining the reasons for and purposes of the decree. These letters were published in the *Journal officiel de la République française* at the head of the decree and form a very important source of information of the intentions of the legislator in the particular case. The system of cabinet government in France made it possible for Parliament to interpellate the responsible minister concerning the decree legislation enacted and the policy followed by the government in regard to the colonial possessions. Though this parliamentary control certainly had its very good points, the rapid change in governments under the Third Republic was responsible for many oscillations even in broader aspects of colonial policy which, in turn, reflected itself in frequent legislative changes and experiments. These very often hindered the steady development of the overseas possessions.

Under the Third Republic the decree power of the President did not curtail the basic right of the French Parliament to legislate for the overseas possessions in any matter. None of the enactments treated above had set any limits between the two legislative sources, decree and law, but had only recognized the decree power as existent. It is commonly agreed that the President cannot by decree enter into any financial obligations or cede any part of territory. In many other respects, however, legislation has sometimes been enacted by law and at other times by decree.[11] It is certainly desirable that the spheres of decree and law should be more clearly defined, as has been done in Belgium by the Colonial Charter.

Another basic question of considerable importance is whether, and to what extent, legislation enacted for the mother country

[11] No consistency at all can be found. In the main one might say that more important enactments are submitted to parliamentary approval. However, that does not always hold true; e.g., courts in Tunisia and Algeria have at times been instituted by laws and at other times by decrees.

applies to overseas possessions. The basic principle is that legislation enacted for metropolitan France can be used in the dependencies only if especially made applicable thereto. This could be done either in the law itself, by a separate law, or by a presidential decree. The latter was the most frequent procedure in practice. As a consequence, the law had only the force of a decree in the possession for which it was thus enacted; that is, it could be altered by decree as well as by law.

There are a few exceptions, however, to this rule. Laws regulating the organization and functioning of governmental or judicial agencies which have their seat in the capital but extend their functions to all French territory (metropolitan and overseas) are applicable in the whole of the French Empire without express extension. The same is true for laws where the intention of the French Parliament to legislate for all of the French territory becomes apparent from the law itself. A good example is the legislation for civil servants in general. A third exception is historical. The so-called Constitution of the Year III (1795), which established the *Directoire* in France, stipulated that all legislation should automatically apply to the colonial as well as to the metropolitan area. Where, therefore, legislation from this period (1795–99) is still in force, it is applicable to the overseas possessions.

Certain exceptions to the general rule apply especially to Algeria. In that territory all legislation of general content enacted *before* the formal annexation of Algeria in 1834 applies automatically. Amendments to this legislation likewise go into effect in Algeria without special extension. It is a further peculiarity that all of these enactments, including laws, may be altered by presidential decree. New legislation enacted in France *after* 1834 applies to Algeria only if especially extended to it.

The situation with regard to the protectorates is again different. The reasons are the duality in legislative procedure and the legislative decentralization. Metropolitan legislation, as a rule, has to be made applicable to a protectorate by an act of the local legislative authorities, that is, the native sovereign and the French Resident General. Thereby the French law becomes a law of the protectorate, with all the formal requirements and characteristics of such. An amendment to the metropolitan law cannot go into effect in the protectorate without an enactment by the local authorities. On the other hand, an amendment may

be added in the protectorate regardless of similar amendments to the metropolitan legislation. There is, however, one exception to this rule. It has been stated above that even for the protectorates some legislation was enacted by the central French government without any interference of the protectorate authorities. As far as a metropolitan law dealt with matters which would come within the realm of this central legislation for the protectorates, it could be extended simply by a French law or a presidential decree.

Legislation from the Fall of France to the Allied Occupation of North Africa [12]

On July 9, 1940, the French Parliament, assembled in Vichy, voted to give the government of Marshal Henri Philippe Pétain full powers to establish a new constitution. The draft of a new constitutional law along totalitarian lines had been drawn up by Pierre Laval and was enacted by the *Assemblée nationale* on the following day.[13] By Constitutional Act No. 1, Marshal Pétain assumed the functions of *Chef d'état* (Chief of State). His powers were fixed by Constitutional Act No. 2 of the same date. They were practically all-inclusive and comprised full legislative powers which should be exercised until such time as new assemblies outlined in the constitution would be formed. The old Republican legislature—Senate and Chamber of Deputies—was theoretically kept in being. They were adjourned *sine die,* however, and could be convened only by the Chief of State.[14] Therefore, during the time of the Vichy regime, all legislation emanated from the Chief of State, who united in his person all legislative and supreme executive functions. There were no changes in the basic processes of legislation for the overseas possession except for the fact that the Chief of State could, of course, enact all legislation which under the Republic would have needed parliamentary approval. Unlike the development in Belgium's African possessions, the fall of France did not alter the fundamental French concept of legislative centralization. Nearly all important legislation continued to emanate from the governmental

[12] A discussion of the constitution of the Vichy regime may be found in the article by J. G. Heinberg in H. Zink-T. Cole, *Government in Wartime Europe and Japan,* 2nd ed., New York, 1942, pp. 180–205.

[13] Under the constitution of the Third Republic the *Assemblée nationale* consisted of both houses of the French Parliament meeting in joint session.

[14] Cf. Constitutional Act No. 3.

center (i.e., Chief of State), and the powers of France's representatives in the dependencies were not increased. Changes introduced in metropolitan France resulting from the totalitarian orientation of the regime were also applied to the possessions, including the protectorates. Important among these were the practical abolition of advisory and legislative assemblies and the discriminatory legislation against Jews and persons opposed to the regime. Technically these changes, though very important, often took the form of amendments to existing legislation, leaving the original legislative act formally in being but changing its contents entirely.

Legislation Since the Allied Occupation of North Africa

The occupation of North Africa by Allied forces in November 1942 and the subsequent abolition of the unoccupied zone in France by Germany again altered the situation profoundly with regard to the central control of the French territories in North and West Africa.[15] After the Allied landing and the signing of an armistice between the Allied and the French forces, Admiral François Darlan took over the governmental functions. He assumed the title of High Commissioner of French North and West Africa. His government was organized on December 1, 1942. According to a communiqué broadcast by Radio Morocco on that date,[16] the High Commissioner assumed the functions and prerogatives of the Chief of State as representative of French sovereignty. This assumption of supreme power was justified in the communiqué by the fact that the Chief of State, Marshal Pétain, was incapacitated, being a prisoner of the Germans, and could not act. The High Commissioner, therefore, became Commander-in-Chief of the land, sea, and air forces and, like the Chief of State, also the center of the political power. He exercised the legislative functions otherwise fulfilled by the metropolitan government. His legislative enactments were called ordinances. He was assisted by an Assistant High Commissioner, General Bergeret, a civil and a military cabinet, and several so-called services which corresponded to governmental departments or sections of such. These services were divided into four groups: (1) Economic Affairs comprising the services of indus-

[15] A discussion of the political reasons for and implications of these changes is outside the scope of this study; they will be treated only from the standpoint of their administrative importance.

[16] Reprinted in *Free France*, Vol. II, no. 12 (Dec. 15, 1942), pp. 344–45.

trial production, commerce, agriculture, communications, and labor; (2) Financial Affairs dealing with the Empire budget, currency, treasury, and central banking problems; (3) External Relations; and (4) Political Affairs comprising the news and information services and the services dealing with the maintenance of public order. There also existed a military section and an information section.

The High Commissioner was aided by the Imperial Council consisting of the Assistant High Commissioner, the Governors General of Algiers and of French West Africa, the Resident General of Morocco, the Commander of the African land and air forces, the Vice Admiral, Commander-in-Chief of the French naval forces in Africa, and, upon special summons, the General commanding the French military forces in French West Africa. The Imperial Council was an advisory body. As far as can be seen from reports, the two high officers mentioned last did not take part in the deliberations of the Council. Attached to the Council was the *Secrétariat général* composed of the delegates from the different territories permanently residing in Algiers. This Secretariat formed the permanent link between the High Commissioner on the one hand and the administrations of French North and West Africa on the other. The temporary governmental organization created by Admiral Darlan in Africa thus did not constitute a new colonial government supplanting any of the existing administrative organizations in French North and West Africa. It exercised the functions of a central government uniting the territories under its control into a sort of federation.[17]

The assassination of Admiral Darlan on December 24, 1942, deprived this organization of its key official. The designation of a new high commissioner was placed in the hands of the Imperial Council, which elected General Henri Honoré Giraud as High Commissioner of French North and West Africa. The governmental organization as created by Admiral Darlan was continued for a while. On February 5, 1943, however, General Giraud, after consultation with the Imperial Council, abolished this Council and replaced it by a *Comité de guerre* (War Com-

[17] Neither of the two central governmental organisms existing at present, the Fighting French National Committee in London and the provisional administration of General Girault in Algiers, has been recognized as a *de jure* government by either Great Britain or the United States. The diplomatic dealings with these bodies legally merely entail a recognition of the *de facto* control which they exercise over French territory.

mittee). The title of High Commissioner was also abolished and General Giraud assumed the title of French Civil and Military Commander-in-Chief. The new War Committee is composed, at least in part, of the members of the former Imperial Council. Other persons may be nominated to it by the Commander-in-Chief. The Commander-in-Chief retains supreme legislative and executive powers. He nominates all officials, including the Residents General and Governors General of the North and West African possessions and also the judicial magistrates. In a speech of March 15, 1943, General Giraud promised the repeal of the Vichy legislation and the re-establishment of the laws of the Third Republic. In consequence of this speech, ordinances were enacted on March 17 which repealed some of the totalitarian legislation enacted between June 1940 and November 1942. Very important among these enactments is the reinstitution of the local assemblies which had been "suspended" under the Vichy regime. The assemblies will continue to function in the form they had on June 22, 1940. New elections will be held only after the liberation of France, at a time fixed by the competent authorities. Until that time the life of the present assemblies has been prolonged. The discriminatory legislation against Jews and Freemasons was also, at least in principle, abolished. In these cases, however, the execution was left to secondary legislation to be enacted by the Governors General and Residents General. The name *"République française"* (French Republic) takes again the place of the name *"Etat français"* (French State) in public documents.

THE CENTRAL ADMINISTRATION OF DEPENDENCIES

During the Third Republic the administration of the French Empire was split up among three different ministries. The two North African protectorates, Tunis and Morocco, were controlled by the Ministry of Foreign Affairs because of their special legal character. The Residents General and their deputies had the formal status of ambassadors or ministers extraordinary and envoys plenipotentiary and were answerable to the Foreign Minister. This status was established for Tunisia by a presidential decree of June 23, 1885, and for Morocco by a presidential decree of June 11, 1912. All communications of the Residents General with other French governmental departments had to pass through the Foreign Ministry.

Algeria has gone through different stages with regard to the central administrative control. Between the beginning of the occupation in 1830 and the annexation of the country by the royal ordinance of July 22, 1834, Algeria was regarded as foreign territory under military occupation. During the second period, which lasted from 1834 to 1848, Algeria was under the control of a military governor general attached to the Ministry of War. He was assisted by a civil administrator. During the next ten years a tendency developed to supplant the military administration of Algeria by a civil one. The constitution of November 4, 1848, declared Algeria to be French territory. In consequence, certain services—namely, judicial administration, public instruction, religious supervision, and finances—were taken away from the Ministry of War and put under the control of the ministries in charge of the respective services in metropolitan France. The Governor General retained his former powers only in the military areas. The rest was administered by *Préfets* (Prefects) under direct metropolitan control. In 1858, under the Second Empire, the Ministry for Algeria and the Colonies was created in Paris and the administrative control was centralized there. This arrangement lasted only until 1860, when military control over Algeria was, in the main, restored. The fall of the Second Empire and the establishment of the Third Republic in 1870 brought new changes. The tendency to assimilate Algeria administratively with the metropolitan territory became very pronounced. All Algerian services were put under the control of the departments charged with these services in metropolitan France. This system of extreme assimilation in administrative matters did not work very well, and in 1896 a reaction set in and Algeria was put under the control of the Ministry of the Interior. Only those services which had been under the charge of the technical ministries after 1848, with the addition of military and naval matters, were not attached to the Ministry of the Interior. This system prevailed throughout the Third Republic.

All colonies, in the technical sense, were under the control of the Ministry of the Colonies in Paris. The Governors General and the Governors were answerable to that department.

The fall of France did not materially alter the administrative affiliation of the dependencies. The Minister of Colonies was replaced in the Pétain regime by the Secretary of State for the Colonies who functioned under the control of the Minister of

War. After the Allied occupation of North Africa, the necessary central services were created in Algiers.

CENTRAL ADVISORY BODIES IN COLONIAL AFFAIRS

The Haut Comité méditerranean et de l'Afrique du nord (High Committee for the Mediterranean and North Africa)

This body was created by a decree of February 23, 1935 (*J.O.R.F.*, 2346). Its purpose was to unify the policy with regard to the North African possessions without breaking up their attachment to different central departments of the home government. It was designed to deal with the problems common to Algeria, Tunisia, Morocco, and the Near Eastern territories under French mandate, as well as with the relations of those territories with each other and with the mother country. The Committee was composed of the *Président du conseil* (Prime Minister), the Minister of Foreign Affairs, the Minister of the Interior, the Minister of War, and the Minister of the Colonies as representatives of the government; the Governor General of Algeria, the Residents General of Tunisia and Morocco, and the High Commissioner in Syria and the Lebanon as representatives of the territorial administration. The Committee had to meet at least once a year. By a decree of April 14, 1937 (*J.O.R.F.*, 4251), the *Secrétariat permanent* of the High Committee was created whose functions were to form a permanent body acting for the Committee at the seat of the central government and to prepare the business for the meetings of the High Committee. By the same decree, the *Commission d'études du haut comité* (Commission of Studies of the High Committee) was formed which replaced the former *Commission interministérielle des affaires musulmanes* (Interministerial Commission of Moslem Affairs). It was composed of representatives of the different ministries and also held extraordinary sessions devoted specifically to Algerian affairs in which twelve Algerian natives, six nominated and six elected, took part.

Conseil supérieur de la France d'outre-mer (Superior Council of Overseas France)

This was the most important of a number of agencies and councils attached to the Ministry of Colonies and was charged with the study of colonial problems. The organization of this body was changed several times, the last thorough reorganiza-

tion taking place in 1937 (Decree of June 24, 1937, *J.O.R.F.*, 7136). It consisted of a bureau, an economic section, and a legislative section. The president was the Minister of Colonies. The purpose of the Council was to give advice upon questions relating to the French overseas possessions as far as they were under the jurisdiction of the Ministry of Colonies; that is, all colonies in the technical sense as well as the protectorates in Indo-China. The economic section was charged with the study of economic problems; the legislative section had to deal with administrative, financial, and legislative matters. Both sections comprised the Senators and Deputies elected from the colonial possessions to the Parliament in Paris, persons elected to the Council by the French citizens in some colonies (primarily in those which had no parliamentary representation), and representatives of the native populations as designated by the Governors of the different colonies. It further comprised members appointed by the Minister of Colonies. Among them were representatives of different colonial interests and of chambers of commerce interested in the exchange between the mother country and the colonial possessions. The legislative section consisted of the same members as the economic section in the first group. In addition, however, a certain number of jurists were nominated by the presidents of high metropolitan courts and the law schools. The bureau consisted of the president of the economic section as president, the president of the legislative section, the vice-presidents of both sections, one colonial Senator, two colonial Deputies, and two of the delegates to the Council, all elected by their colleagues. The Council had to meet at least twice a year, and a report concerning its work had to be published at the end of the second annual session.

THE ENDEAVORS AT UNIFICATION OF THE CENTRAL ADMINISTRATION FOR THE OVERSEAS POSSESSIONS

The splitting up of the central administrative control of the overseas possessions among at least three central agencies evoked strong criticism from many French political observers. It was argued that a unified administration would be in a much better position to handle the difficult economic and political problems of the Empire. There was considerable hesitation, on the other hand, to break up the traditional affiliations of the possessions. It was pointed out especially that the North African protectorates should remain attached to the Ministry of Foreign

Affairs due to their special legal position. A short-lived attempt to create a *Ministère de la France d'outre-mer* (Ministry of Overseas France) was made in 1934. The Ministry existed, however, not quite a month (January 10–February 9).[18] A step to enhance a unified policy among the French possessions around the Mediterranean was taken by the creation of the High Committee for the Mediterranean and North Africa discussed above. Further endeavors were made to bring North African affairs under the co-ordinating control of one minister in the home government but again without interfering with the existing administrative ties. In October 1937, M. Albert Sarraut was appointed *Ministre d'état pour la contrôle et la coordination de l'Afrique du Nord* (Minister of State for the Control and Co-ordination of North Africa). He was assisted by the *Conférence de coordination de l'Afrique du Nord* (Conference for the Co-ordination of North Africa) consisting of representatives of the different ministries. This conference was established by an *arrêté* (order) of October 26, 1937 (*J.O.R.F.*, 12042). By a decree of May 4, 1938 (*J.O.R.F.*, 5075), this organization was altered again, and the Deputy Prime Minister, M. Camille Chautemps, was put in charge of the control and co-ordination of these territories.

Owing to the great importance of the African possessions, the Vichy regime also tried to achieve co-ordination in these regions. For this purpose General Maxime Weygand was made Delegate General for North Africa. In this capacity he too was charged with the control and co-ordination of the territories rather than with their direct administration. The administrative affiliations with the central governmental agencies were not altered. After his recall Vice Admiral Fenard was appointed *Secrétaire général permanent de l'Afrique française* (Permanent General Secretary of French Africa) in December 1941. His function was also one of co-ordination and control. The Vichy regime also tried to co-ordinate the African territories south of the Sahara and strengthen its control over them. For this purpose the Governor General of French West Africa, M. Boisson, was made *Haut Commissaire de l'Afrique française* (High Commissioner of French Africa) by a decree of August 6, 1940 (*J.O.R.F.*, 4657). Due to

[18] In the literature the administrative unification with regard to the overseas possessions was frequently discussed. Cf. J. Goulven, *Traité d'économie et de législation marocaines*, Paris, 1921, I, 170–75; Girault-Milliot, *op. cit.*, 6th ed., pp. 579 ff.; L. Milliot, "L'organisation française de l'Afrique du Nord," *A. F.*, XLII (1932), pp. 640–45; 1933, pp. 140–45. For the political repercussions of the setting up of a special ministry in 1934, cf. *A. F.*, XLIV (1934), pp. 76–82.

the fact that French Equatorial Africa joined the Free French movement, the powers of the High Commissioner hardly extended any further in practice than those of the Governor General of French West Africa. The appointment had, therefore, little practical effect.

After the Allied invasion of North Africa, these co-ordinating functions all ceased. The central control over the North and West African territories is, today, exercised by the provisional governmental machinery established in Algiers.[19]

PROMULGATION AND PUBLICATION OF THE LEGISLATION

In order to become effective, all legislative enactments have to be promulgated, that is, put into execution officially. After the promulgation they are published in official gazettes. All laws and decrees as well as the ministerial orders enacted by the central authorities were published in the *Journal officiel de la République française,* which was the official gazette of the French Republic. In 1941 its name was changed to *Journal officiel de l'Etat français* by the Vichy regime.

For Algeria the promulgation of enactments by the President and publication in the *Journal officiel de la République française* was sufficient. There exists a *Journal officiel de l'Algérie* in which all the orders of the Governor General and other local authorities, and also the important enactments of the central government, are published. With regard to the latter, the publication in the *Journal officiel de l'Algérie* is merely a matter of convenience to insure a wider publicity.

The situation for the colonies was different. All enactments, including those of the central government, had to be promulgated by the Governor General and had to be inserted in the local *Journal officiel.*

In Tunisia and Morocco the legal enactments of the native rulers have to be promulgated by the Residents General. All decrees and orders are published in the official gazettes, the *Journal officiel de la Tunisie* and *Bulletin officiel de Maroc.*

[19] On June 3, 1943 a *Comité français de la liberation nationale* (French Committee of National Liberation) was formed in Algiers. This Committee takes over the functions of a provisional central government for all the French Empire not occupied by the enemy. The legislative and executive functions of the Commander-in-Chief have devolved upon this Committee.

Chapter II

MOROCCO AND TUNISIA

FEATURES COMMON TO THE PROTECTORATES

Introduction

Morocco and Tunisia are protectorates according to international law.[1] They are not integral parts of the French national territory like Algiers or French West Africa, and they retain to some extent their native government. The relations between France and these two territories are based upon treaties which were concluded between the French Republic and the sovereigns of Morocco and Tunisia respectively.

Two treaties establishing a French protectorate over Tunisia were concluded with the Bey of Tunis. One on May 12, 1881 (Treaty of Bardo or Casr-Saïd); a second one, confirming and amplifying the first treaty, on June 8, 1883 (Treaty of La Marsa).

The protectorate over Morocco is based upon the treaty of March 30, 1912 (Treaty of Fez) with the Sultan. Not all of Morocco or, as it is also called, the Sherifian Empire, is under French control. By a convention between France and Spain of November 27, 1912, France recognized the rights of Spain in the Spanish zone of influence which comprises the northern part of Morocco. All of Morocco, however, remained nominally under the control of the Sultan. In the Spanish zone all of the powers of the Sultan are delegated to a *khalifa* (deputy) who resides at Tetuan. The Spanish government is represented in the Spanish zone by the High Commissioner.[2] Spain further possesses a small

[1] In addition to these protectorates, according to international law, there exist in Africa so-called colonial protectorates. These are mostly British. France has none in Africa. They are in administrative practice hardly distinguishable from colonies. The differentiation between colonies and colonial protectorates has mainly historical reasons. Cf. A. B. Keith, *The Governments of the British Empire*, London, 1935, pp. 463–66; F. D. Lugard, *The Dual Mandate in British Tropical Africa*, London, 1922, pp. 32–36.

[2] France has maintained that her protectorate over Morocco under the treaty of 1912 covered the whole country, not only the French zone, and that Spain had merely special rights and privileges in the Spanish zone. This formal state of affairs was recognized by Secretary of State Lansing in his note of October 20, 1917, cf. G. H. Hackworth, *Digest of International Law*, Washington, D. C., 1940, I, 89–90. Cf. also the stipulations of the treaties of

strip of land in the southern part of the French zone—Ifni, which is a Spanish colony and has treaty rights in the Draa valley and around Cape Juby. For a long time Ifni was only nominally under Spanish control; it was effectively occupied by Spain in 1934.[3]

A special status was also accorded to the city of Tangier. It was based upon the Tangier Statute of 1923 (modified in 1928) which was agreed upon by France, Great Britain, and Spain. The zone had an international municipal administration and was to be permanently neutralized and demilitarized. After the outbreak of the war, however, in June 1940, Spanish *khalifan* troops occupied Tangier. The international administration of the zone was abolished in November 1940, and in December 1941 the laws which apply to the Spanish protectorate were extended to Tangier.[4] The *Mendoub,* the representative of the Sultan in Tangier, was ejected by the Spanish authorities in March 1941.

Legal Nature of the French Protectorates

The treaties which established the two French protectorates in North Africa have not entirely abolished the native rule which existed in these territories prior to the French occupation. The governments of the Sultan of Morocco and of the Bey of Tunis still exercise governmental functions, though, of course, under French control. This certain duality in government and administration—French on the one hand, native on the other—is in the nature of these protectorates under international law. Unlike the case of outright annexation of the territory, the government of the protected state is left in being and is allowed to exercise some functions. The extent of control over these functions by the protecting state is determined by the treaty which established the protectorate. The protected state remains a state in the

Versailles and St. Germain, discussed by J. Goulven, *Traité d'économie et de législation marocaines,* Paris, 1921, I, 70 ff. Actually, of course, the Spanish government exercises full control over the Spanish zone.

[3] A brief description of the basic organization as it was established in the Spanish zone is given in Goulven, *op. cit.,* I, 85–94.

[4] For a brief summary of the contents of the Statute of 1923, cf. Hackworth, *op. cit.,* I, 92–95. A more extensive treatment of the position of Tangier may be found in E. Rouard de Card, *Le statut de Tanger d'après la convention du 18 décembre 1923,* Paris, 1925; and in G. H. Stuart, *The International City of Tangier,* Stanford, 1931. The most recent developments are briefly sketched in *The Statesman's Yearbook,* 1942, p. 1103.

sense of the international law and retains its international personality.[5] The establishment of this type of protectorate furthermore does not involve a change in citizenship. The natives of the protectorate remain subjects of the protected state.

The Principles of Legislation

A result of this existence of two governmental organisms, the protecting state and the protected state, is a duality in the legislative procedure. In order to be valid, legislation requires, as a rule, the co-operation of authorities of both states. The bulk of the legislation is issued by the native sovereigns, but it is prepared by French services and needs the approval and the promulgation of the French Resident General. Furthermore, both the Treaty of La Marsa and the Treaty of Fez contain a clause to the effect that administrative, judicial, financial, and other reforms which the French government considers important should be introduced.[6] The French government, therefore, took the initiative in sponsoring the pertinent legislation. The actual introduction, however, rested with the protectorate authorities, who were bound to enact the legislation under the treaties.[7]

Another problem is to whom the protectorate legislation applies. It is a rule that laws enacted in Tunisia and Morocco before the establishment of the protectorates apply exclusively to the native populations.[8] Legislation enacted after that may equally apply only to natives if expressly so stated or if this is apparent from the contents. However, it may be, and frequently is, applicable to all persons in the protectorate or even to the French only.

[5] This was maintained on the part of the United States with regard to Morocco; cf. the letter of the Secretary of State to the Ambassador in Great Britain of October 23, 1923, *Foreign Relations*, II (1923), 581–82. The participation in foreign relations is formal as far as Morocco and Tunisia are concerned. The French Residents General fulfill the functions of foreign ministers. It might, however, be noted that the President of the United States addressed letters to the Residents General and to the native sovereigns at the time of the Allied occupation of North Africa. Cf. also on this point of the international personality of the protected state Pierre Lampué, "Le régime législatif des pays de protectorat," *Revue du droit public et de la science politique en France et à l'étranger*, LVI (1939), 5–11, with extensive bibliography, and L. Oppenheim, *International Law*, 4th ed., London, 1928, pp. 187–93.

[6] Treaty of La Marsa, article 1; Treaty of Fez, article 1.

[7] Cf. article 1 of the Treaty of La Marsa and article 4 of the Treaty of Fez.

[8] Cf. A. Girault, "L'exercice du pouvoir législatif dans les pays de protectorat," *Revue politique et parlamentaire*, CXXXII (1927), 14 f.

The procedure by which metropolitan legislation could be made applicable to the protectorates has already been discussed. It remains to point out that important legislation was often enacted simultaneously, or within only a very brief interval, by the French legislative authorities and by the legislative authorities in the protectorate. This procedure was mainly followed in cases where public services were in form protectorate services, in substance French.[9]

MOROCCO

LEGISLATION

All legislation enacted in the French protectorate itself emanates from the Sultan. The Moroccan sovereign unites in his person the functions of spiritual head of the Moslem community (*imam*) and that of temporal ruler (*sultan*). He is the guardian of the Moslem religious law which may not be altered and which he is bound to observe.[10] A further restriction of his legislative powers was caused by the stipulations of the protectorate treaty of 1912. Within these limitations, however, he is formally the supreme legislator in Morocco. His legislative enactments are called *dahir*.[11] A special French service, the *Service des études législatives* (Service of Legislative Studies) which is part of the *Secrétariat général,* is the centralized drafting agency for the legislation of the protectorate. This service was organized in its present form by an *arrêté* (order) of the Resident General of January 24, 1928. The different services send their preliminary drafts to this agency, where they are put into final form. Important legislation is submitted to the *Comité de législation* (Committee on Legislation). This Committee is likewise a French body and was created by an *arrêté* of the Resident General of November 8, 1913. It consists of the head of the General Secretariat as president, of several members of the Court of Ap-

[9] E.g., in the establishment of the French courts in Tunisia and in Morocco.

[10] A general outline of the rights and powers of a Mohammedan ruler may be found in Abdur Rahim, *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i, and Hanbali Schools,* London, 1911, pp. 383 ff.

[11] This term is often translated "decree." It has to be emphasized, however, that unlike the decrees of the French President the *dahirs* are not based upon legislative delegation but are enactments of the normal legislative authority in the protectorate. Another, and perhaps better, translation sometimes used is "Imperial Edict."

peal in Rabat, and several other high French officials as permanent members. High officials of the service which worked out the first preliminary draft of the legislation in question may be taken on as temporary members.

Not only the preparation of the legislation is in French hands, however. All *dahirs* (edicts) of the Sultan have to have the approval and signature of the Resident General, who has also to promulgate them.[12] This power to visé and promulgate the *dahirs* gives the French authorities the means of hindering effectively the enactment of any legislation which might be contrary to their wishes. On the other hand, it has been held that the Sultan has no formal right to veto legislation proposed to him by the French because of the wording of the protectorate treaty which put him under obligation to enact such reform measures as the French consider necessary.[13]

THE CENTRAL ADMINISTRATION

In the administrative organization of the French protectorate, the French and the native branches have to be distinguished. It has been pointed out that this does not mean that there are two distinct administrations in the protectorate; both branches are parts of the Moroccan administration, and both are under the supreme control of the Resident General.[14]

The Sherifian Government

Before the French occupation of the country, the Sultan was assisted in the exercise of his executive functions by a number of ministers. The name of this Sherifian government was *Makhzen*.[15] Because of the establishment of the protectorate, several of the ministries were abolished and the *Makhzen* in general was reorganized. This new organization was created by a *dahir* of

[12] The powers of the Resident General in this respect are based upon the Treaty of Fez, article 5. The formula used is: *Vu pour promulgation et mise à exécution* (Seen for promulgation and put in execution). The Sultan does not sign the *dahirs* but affixes his seal. The Resident General signs them.

[13] Girault-Milliot, *La Tunisie et le Maroc,* 6th ed., Paris, 1936, p. 278, n. 1.

[14] Cf. P.-Louis Rivière, *Traités, codes et lois du Maroc,* Paris, 1925, Vol. II, p. 36, n. 1.

[15] For the organization of the *Makhzen* (sometimes also spelled *Maghzen*) in pre-protectorate times, see Goulven, *op. cit.,* I, 105–15; Rivière, *op. cit.,* Vol. II, p. 2, n. 1; Girault-Milliot, *op. cit.,* 6th ed., pp. 268–69. The term *Makhzen* originally meant "storehouse" and was later used to designate the treasury. In the end, the word came to denote not merely the treasury but the whole government.

October 31, 1912. Since then several reorganizations of the *Makhzen* have taken place.[16] The most important office in the *Makhzen* is that of Grand Vizier. He is the Prime Minister and the Minister of the Interior. As such, he is in charge of the general administration and exercises control over the officials of the native branch of the administration. By delegation from the Sultan, the Grand Vizier exercises a regulatory power. The regulations of the Grand Vizier are called *arrêtés viziriels* (orders of the Vizier). These orders also have to be approved and promulgated by the Resident General. Both the *dahirs* and the *arrêtés viziriels* are published in the official gazette of the protectorate, the *Bulletin officiel*. The Grand Vizier may delegate on his part his regulatory powers in certain specified matters. Since the Grand Vizier exercises control over the native functionaries in the territorial subdivisions, he also controls the judicial administration as far as it is in the hands of these officials. He is also in charge of the control of the rabbinical courts.[17]

The Vizier of Justice is in charge of the religious judicial administration, which is in the hands of the *cadis* (native judges). The Vizier of the *Habous* is in control of the *Habous*, the pious foundations.[18] None of the several Viziers, except the Grand Vizier, has any right to issue regulations. Regulations concerning their departments are prepared by them but have to be signed either by the Sultan himself or by the Grand Vizier. They are then published as *dahirs* and *arrêtés viziriels* respectively. Other members of the *Makhzen* besides these Viziers are the Delegate of the Grand Vizier for Public Instruction, the President of the Sherifian High Court, and the President of the Religious Court of Appeal. The Sherifian officials forming the *Makhzen* are, of course, in constant collaboration with the French protectorate authorities.

[16] Cf. Rivière, *op. cit.*, Vol. II, p. 2, n. 1; and Girault-Milliot, *op. cit.*, 6th ed., pp. 270–71.

[17] See below for these courts, p. 50.

[18] These *Habous* may be defined as foundations or trusts made in favor of God, a saint, or a religious establishment. Such foundations or trusts are parcels of real estate and the usufruct is usually assigned to a number of persons successively. These persons need not be connected with the religious establishment in whose favor the foundation is set up. After their line has run out, the religious establishment enjoys unencumbered use of the *Habou*. A brief discussion of the nature of this very widespread institution is given by Rivière, *op. cit.*, III, 839–40. Cf. also Girault-Milliot, *op. cit.*, 6th ed., pp. 428–33.

The Liaison between the Makhzen and the French Authorities

The liaison between the two branches of the central administration in the French zone is accomplished by the *Direction des affaires chérifiennes* (Department of Sherifian Affairs), which is headed by the *Conseiller du gouvernement chérifien* (Counselor of the Sherifian Government).[19] This French office also exercises a general control over the central native administrative and judicial services and over the higher Moslem education. It consists of the *Section d'état* (State Section) which is concerned with the liaison between the *Makhzen* and the protectorate administration in general, the *Contrôle des Habous* (Control Office for the Pious Foundations), and the *Contrôle de la justice indigène* (Control Office for the Native Jurisdiction).

The French Branch of the Central Administration

The highest French official in the protectorate is the *Commissaire résident général* (Commissioner Resident General). This office was created by a decree of the President of the Republic of June 11, 1912. According to this decree the Resident General is "the depository of the powers of the French Republic in the Sherifian Empire." [20] He is the representative of the protecting power and the highest authority in the protectorate. All communications with the central government have to pass through him. According to the Treaty of Fez, the Resident General is the sole intermediary between the Sultan and the representatives of foreign powers; that is, he acts as foreign minister. He further exercises supreme control over all the administrative services and is responsible for the maintenance of order in the interior and for the defense of the protectorate.[21] A general commanding the troops in Morocco under the Resident General served as actual military commander during the period in which the Resident General was a civilian. General Nogués was made Commander-in-Chief of the Moroccan forces at his appointment to the post of Resident General.[22] The Resident General also fulfills the functions of Moroccan Minister of War.

Besides his powers of approving the *dahirs* of the Sultan and the *arrêtés viziriels*, the Resident General is himself a source of

[19] *Dahir* of July 24, 1920.

[20] Cf. article 2.

[21] Cf. the presidential decrees of July 6, 1925, art. 1; and of October 3, 1926, art. 1.

[22] Decree of September 16, 1936.

legislation. This is, as a rule, all secondary legislation based on the regulatory powers conferred upon the Resident General by various decrees. In general this regulatory power is confined to matters concerning the French colony exclusively and to those which are under exclusive French control, as, e.g., military matters. The orders of the Resident General are called *arrêtés* and, like the *dahirs* and the *arrêtés viziriels,* are published in the *Bulletin officiel.* The legislative powers of the Resident General were very much increased, however, by an ordinance of High Commissioner Darlan in November 1942. According to this ordinance the Resident General may take by decree all measures which normally were enacted for the French zone by metropolitan laws or decrees. That means that the statutory power of the central government was delegated for the time being to the Resident General as far as affairs of the protectorate were concerned.

The *Délégué à la résidence générale* (Delegate of the Resident General) [23] is the deputy of the Resident General and replaces him in case of absence. He fulfills the functions of *Secrétaire général* (General Secretary) of the protectorate.[24]

The central functions of the French branch of the protectorate administration are exercised by the *Secrétariat générale* and by so-called *directions générales* and *directions* which correspond to our governmental departments. These *directions* are composed of different sections which are called *services.* The number of *directions générales* and *directions* has varied considerably since the establishment of the protectorate. In 1939, following the outbreak of the war in Europe, the number of these central agencies was greatly increased. This led to an oversized central administrative machinery, and a *dahir* of September 28, 1940 (*B.O.M.,* 946–47), completely reorganized the setup of these departments. The Sherifian administration now comprises the *Direction des finances, Direction des communications, Direction de la production agricole* (Department of Agricultural Production), *Direction du commerce et du ravitaillement* (Department of Commerce and of Provisioning), *Direction de l'instruction publique,* and *Direction de la santé publique et de la jeunesse*

[23] For the organization of this office, cf. the presidential decree of August 6, 1936, and the *arrêté* of the Resident General of August 31, 1936.

[24] This office was variously constituted as a separate organization or put under the control of the delegate of the Resident General. Cf. Rivière, *op. cit.,* Supplement, 1937, p. 133, n. 4.

(Department of Public Health and Youth). The Department of Commerce and Provisioning was detached from the Department of Agricultural Production by *dahirs* of December 15, 1941 (1942, *B.O.M.*, 3).

By an *arrêté* of the Resident General of the same date, the political services of the protectorate were reorganized too. The *Direction des affaires chérifiennes* and the *Direction des affaires politiques* (Political Department) are under the direct control of the Resident General. The latter department comprises the *Services de contrôle politique et des affaires indigènes* (Services of Political Control and Native Affairs), *Contrôle des municipalités* (Control Agency for the Municipalities)—these two services constituting the French control agencies in the territorial subdivisions—and the *Services de sécurité publique.* The *Secretaire générale* has under his immediate control the *Service de législation, Service de contrôle administratif,* and the *Conseiller economique* (Economic Counselor) who is charged with the coordination of the economic services.

All these departments are staffed with French personnel. However, only the control agencies which are under the direct supervision of the Resident General are French agencies in the real sense—that is, ruled exclusively by the protecting power. The other departments are protectorate services; Girault refers to them as Sherifian services with French personnel.[25] They are, roughly, those governmental agencies whose establishment became necessary due to modern developments. The *Makhzen* was not extended to fill these modern needs; it remained confined to the control of the native administration, the religious native courts, and the *Habous.* All of the new business was handled by French bodies. Besides these main governmental departments there exist minor offices, a list of which would be too long to give in the framework of this volume.

Emergency Measures Taken at the Outbreak of the War

As a basis for emergency measures to be taken in time of war, the *dahir* of September 13, 1938, adopted the French law of July 11, 1938 (*J.O.R.F.*, 8330–37), on the organization of the nation in time of war. At the outbreak of the war in 1939 a

[25] Girault-Milliot, *op. cit.*, 6th ed., p. 275. The composition of these departments and the assignment of the individual services to the various departments have varied considerably. In view of the present situation changes may be expected to meet the needs of the moment.

state of siege (*état de siége*) for all of the French zone was declared by *arrêté* of the Resident General on September 1, 1939. Under this order all powers of the civil authorities relative to the maintenance of order and public peace passed to the military. Otherwise the civil administration continued to function. Military courts were accorded exclusive jurisdiction over many crimes and misdemeanors, especially those directed against the security of the state. The military authorities were further given the right of search, the power to suppress publications and to prohibit gatherings which they considered as inciting disorders.

THE TERRITORIAL SUBDIVISIONS AND THEIR ADMINISTRATION

The French Administration

The French protectorate of Morocco was for a long period divided into a civil and a military zone. This was due to the fact that the mountainous regions of the interior of the country were still in a state of rebellion. As the pacification of these regions progressed, the military and civil administrations started to overlap and territories under civil control could be found within the military region. This somewhat confused situation was finally disentangled by an *arrêté* of the Resident General of September 19, 1940 (*B.O.M.*, 966–67). The military zone was completely abolished, and the French zone of the Sherifian Empire was divided into six regions. These are:

Région de Casablanca
Région de Marrakech
Région de Meknès
Région de Rabat
Région d'Oujda
Commandement d'Agadir-confins

In each of these regions the *Chef de Région* (Chief of the Region) exercises the political and administrative control as representative of the Resident General. He is assisted by the *Secrétaire général de la Région,* whose function it is to centralize the political and administrative services.

The Native Administration

Before the establishment of the French protectorate Morocco was divided into two distinct parts: the *bled makhzen* (territory

under the control of the *Makhzen*) and *bled siba* (the independent territory whose tribes did not recognize the authority of the Sultan). The territory under the control of the *Makhzen* comprised, and still comprises, mainly the cities, plains, and valleys. The mountain regions remained unconquered. The population under the control of the *Makhzen* is Arabic or Arabicized; the population of the independent regions is Berber. Outside the cities the population is divided into tribes (*qabila*) which are subdivided into *khums* (French: *fractions*). Each *khum* consists of several subfractions, called *fakhdha* or *sheikha*. These subfractions on their part comprise several villages in regions where the population is sedentary, or a number of tents where the tribesmen are nomadic. At the head of the tribes which are under the control of the *Makhzen* stands a *caid*, who is appointed by the Sultan. Under him are *sheikhs* who control the subdivisions of the tribe and *mukadam* who are in charge of the lower subdivisions. The *caid* represents the Grand Vizier and is responsible to him. He has a limited power to issue regulations which must be approved by the French civil control agent. The *caid* exercises both administrative and judicial functions in his territory, collects taxes, and is responsible for the good order. The number of *caids* was larger before the French occupation than it is now. Besides these officials there exists in many tribes and tribal subdivisions a so-called *djemâa*, a council of notables, whose functions were regulated by a *dahir* of November 21, 1916. The members of the *djemâa* are nominated for a period not exceeding three years. The *caid* is the president of the *djemâa* of the tribe; the *djemâas* of the subdivisions are presided over by the *sheikhs*. The French control agent has to consent to the convocation of the *djemâa* and has to be present at its meetings. The *djemâas* are advisory bodies and are also charged with the administration of the communal property.

Because of the gradual pacification of the hinterland more and more Berber tribes were brought under effective control. It has been the policy of France not to extend the political organization of the *Makhzen* territory to these tribes but to leave them under the rule of their own customary institutions.[26] This principle

[26] Cf. on the pacification of the Berber regions H. Simon, "La pacification du Maroc," *Journal of the African Society*, XXIII (Oct. 1934), 329–37. The general French policy with regard to these tribes has been described by R. Montagne, "La politique berbère de la France," *Journal of the African Society*, XXIII (Oct. 1934), 338–52.

was laid down in a *dahir* of September 11, 1914. In this *dahir* the Grand Vizier, in co-operation with the head of the General Secretariat, was charged with the publication of a list of those tribes that followed the Berber customs and with the designation of those laws and regulations of the Sherifian Empire which should, in the future, be applicable to these Berber tribes. In these tribes the *djemâa* plays a much more important role than in the territories under the control of the *Makhzen,* where it has been pushed into the background by the *caids.* Among the Berber tribes the *djemâa* is the highest political organ and exercises administrative as well as judicial functions. The *dahir* of November 21, 1916, on the organization of the *djemâas,* was made applicable to the Berber region by a *dahir* of November 28, 1921, with such modifications as were necessitated by local customs.

French control over the local native officials is exercised under the supervision of the Chief of the Region by two groups of officials. The one consists of the *contrôleurs civils* (civil control agents), the other of the officers of the *Service des affaires indigènes* (Service of Native Affairs). The former group functions in what was once civil regions, the latter is employed in the former military territory. The distinction between the two services goes back to the time of the division of the country into a civil and a military zone. The duties of both classes of officials are, on the whole, identical. They have to supervise the administrative and political activities of the native authorities and the economic development of the subdivision, as well as the health situation. They are further responsible for the maintenance of public order and for the execution of laws of general application which concern only the European population. In the main, however, their function is one of supervision and control rather than of direct administration. That is why these officials are not regarded as Sherifian officials but as representatives of the protecting power. Therefore they are not appointed locally, as the other officials are, by the protectorate authorities but by the central French government.[27] The administrative dualism which could be observed at the top—namely, direct administration by protectorate authorities under the nominal control of the Sultan and supervision by organs of the protecting power—is thus carried through into the territorial subdivisions.

[27] Cf. the presidential decree of July 31, 1913. A detailed description of the composition and the functions of this corps is given by Girault-Milliot, *op. cit.,* 6th ed., pp. 287–92; and by Goulven, *op. cit.,* I, 194–202.

The Municipal Administration

The administrative organization of the municipalities is based upon a *dahir* of April 8, 1917, as amended. Communities may be elevated into municipalities by *arrêté* of the Grand Vizier.[28] The municipalities are administered by *caids* who, in the larger cities, have the title *pasha*. The *caid* or *pasha* is assisted by a deputy called *khalifa*. All these officials are nominated by *dahir*. A French *chef des services municipaux* (chief of municipal services) is appointed by *arrêté* of the Resident General and assists and controls the *caid* or *pasha* in the exercise of his administrative functions. He is charged especially with the maintenance of the municipal services, such as municipal police, public works, hygiene, etc. The *caid* or *pasha* has the right to issue regulations on certain subjects specified in the *dahir* (art. 3). The regulations are enacted upon proposal of the Chief of the Municipal Services, who also has to countersign them. Representation of the population in the government of each of the municipalities is provided by the *Commission municipale mixte* (Mixed Municipal Commission).[29] It is composed of Europeans and natives, the members are designated by *arrêté* of the Grand Vizier, and it is presided over by the *pasha* with the French Chief of Municipal Services as vice-president. The Municipal Commission has to be consulted about certain matters enumerated in the *dahir* (art. 20); on others it can give its advice. In case of disagreement between the *pasha* and the Municipal Commission, the Grand Vizier decides.

Two cities, Fez and Casablanca, have a special municipal regime differing somewhat from that established by the *dahir* of 1917. The most interesting feature with regard to Casablanca is that the Municipal Commission is not merely an advisory body but may make decisions. Resolutions on important matters, e.g., financial matters or public works, can only be executed, however, after being approved by the protectorate authorities. The Commission is a mixed commission, the European members are in the majority.[30] Fez has three distinct assemblies: the *Medjless-el-medina* (assembly of the Arabic section), a special

[28] The most important municipalities are: Casablanca, Rabat, Salé, Port Lyautey (Kénitra), Mogador, Meknès, Marrakesh, and Fez.

[29] The *dahir* of 1917 also instituted native municipal commissions composed exclusively of natives. The last such commission was abolished, however, in 1927.

[30] Cf. for details the *dahir* of June 1, 1922.

assembly for the Jewish quarter (*Mellah*), and a European municipal commission for the modern European city. Both native bodies consist partly of nominated and partly of elected members. A special municipal administration was further created for the suburban areas of Casablanca and Rabat in 1936.

REPRESENTATION OF THE FRENCH AND NATIVE POPULATIONS

The Conseil de gouvernement (Government Council)

The population of the protectorate is represented by the *Conseil de gouvernement*. This Council is an advisory body consisting of a French and a native section. The French section is composed of the Resident General as president; high government officials and heads of various services; the presidents of the French chambers of commerce, industry, and agriculture, and the mixed economic chambers; and twenty-two representatives of the French citizens who are not members of any of these chambers. The representatives of this group are elected by all French citizens over twenty-one years of age who have resided in the French zone for the last six months and enjoy full civil and political rights. Any French citizen who fills these requirements for voting can be elected with the exception of government officials and judges.

The native section (*section indigène*) consists of the Resident General as president, of government officials, and of the presidents and vice-presidents of the native sections of the chambers of commerce, industry, and agriculture, and of the mixed chambers. These functionaries are nominated by the Grand Vizier.

The two sections of the Council meet separately, the French section more frequently than the native section.[31]

NATIONALITY AND NATURALIZATION

The nationality of persons born in Morocco of Moroccan or foreign parents and of children born outside of Morocco of Moroccan parents is determined by two *dahirs* of November 8, 1921. All persons born in the French zone of Morocco of French parents are French citizens. Children of foreign parents are

[31] The legislation for this Council may be found primarily in the *dahir* of January 20, 1919, the *décision résidentielle* of March 18, 1919, and the *arrêté residentiel* of October 13, 1926, as amended. The legislation for the different economic chambers is collected by Rivière, *op. cit.*, III, 655 ff., and the supplements to it.

regarded as French citizens if one of the parents was born in Morocco and is, besides, a national of a power which has renounced its capitulatory rights and whose citizens are, therefore, under the jurisdiction of the French tribunals.[32] Children born of Moroccan parents inside or outside of Morocco are Moroccan subjects. Persons born of foreign parents are regarded as Moroccan subjects if one of the parents was born in Morocco and the condition outlined above does not apply. That means that children born of a national of a state which enjoys capitulatory rights would be regarded as Moroccan subjects if that parent himself had been born in Morocco.[33] Legal provisions for the French naturalization of persons in Morocco have been made. There are no special provisions, however, which would make it easier for a Moroccan subject to acquire French citizenship.

Legal Status of Frenchmen and Foreigners in Private Law

In countries where considerable parts of the population live according to different legal systems, the problem of the so-called "conflict of laws" requires considerable attention. These conflicts may occur every time that persons belonging to different legal systems meet in business deals or where the question arises what law has to be applied to somebody's legal acts. The solution of these conflicts is the topic of a special branch of legal science, the international or interlocal private law.[34] The basic rules for the solution of such problems have been laid down in Morocco in a special legal enactment, the *dahir* of August 12,

[32] Cf. for these rights below p. 40.

[33] From the standpoint of the United States, a child born in a foreign country of parents at least one of whom is American is to be regarded as an American citizen provided certain conditions as to prior residence in the United States have been met by that parent. Cf. the Nationality Act of 1940, sections 201 ff. This is a general rule and has nothing to do with the extraterritorial rights enjoyed by this country in Morocco. The influence of these rights upon the question of citizenship was made the subject of an instruction of the State Department of July 27, 1914. There it was ruled that a child born of parents who have never resided in the United States does not become a citizen of the United States, even though the parents might be members of an extraterritorial American community. Cf. Hackworth, *op. cit.*, III, 15–16.

[34] Cf., e.g., A. Nussbaum, *Principles of Private International Law,* New York, 1943. The conflicts of law arising in a colonial society have recently been treated by A. A. Schiller, "Conflict of Laws in Indonesia," *Journal of Far Eastern Studies,* I (1942), 31–47. The problems are basically the same in North Africa. Schiller also quotes the most important studies made by others in the field.

1913. This *dahir* determines how far their national law has to be applied to Frenchmen and foreigners and how far they are under the legal rules of the protectorate. Foreigners and Frenchmen are treated exactly alike. Questions relating to the personal status and the legal capacity of these persons have to be solved according to their national law. That means that the rules of the national law would apply to the question when a person is of age or when he is allowed to marry without parental consent. The forms of marriage may be the ones of the home country or those of the protectorate. In dealing with contracts, the intention of the parties is to be sought out first of all. If it is apparent that, e.g., in a contract to which an American is a party, the contracting parties wanted to apply American law then it falls under the rules of American law. However, sometimes the intention of the parties might not be clear. In that case the judge will first try to apply the law of the domicile if the parties have a common domicile (e.g., two Americans from New York City). Then he will try to use the national law common to both parties; and if that, too, is impossible, the local protectorate law has to be used. The form of legal acts may either be that required by the national law of the parties, the French law, the protectorate law, or native law and custom. Wills and inheritance are governed by the national law of the deceased. Legal questions relating to personal property, real estate, and torts are solved according to the protectorate law. If a person has no nationality, French law is applied to him. The nationality of corporations is determined by their seat.[35]

Extraterritorial Jurisdiction

The extraterritorial rights of European powers in the countries of the Near and Far East were based upon the so-called "capitulations." These treaties entitled the respective powers to exercise jurisdiction over their subjects in the Eastern country, exempting them thereby from the jurisdiction of the local courts. Originally only the agreements granting such rights which the Turkish Sultan concluded with France and other European powers were called capitulations. In the nineteenth century the term was extended to similar agreements concluded with other Eastern nations.[36] The system of capitulations was once widespread

[35] These complicated problems have been discussed in detail by Rivière, *op. cit.*, III, 2–6.

[36] Cf. Charles Cheyney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Boston, 1922, I, 448–52.

but is now nearly extinct. Before the establishment of the French protectorate most powers had capitulatory rights in Morocco. After she had established her protectorate, France tried to have the different powers abolish their prerogatives and allow their citizens and subjects to be submitted to the French courts in the zone. After the close of the first World War only Great Britain and the United States retained capitulatory rights in the French zone of Morocco. In a treaty concluded with France in 1937, Great Britain agreed to give up her capitulations there.[37] Negotiations with the United States were carried on over a fairly long period but were interrupted by the outbreak of the war in 1939. The United States is therefore the only country which still has capitulatory rights in Morocco. These rights are based upon treaties with the Sultan of 1787 and 1836 and upon later international conventions.[38] The extraterritorial jurisdiction extends not only to citizens and subjects of the United States but also to so-called "protected persons." These are aliens from the standpoint of the United States, and frequently native Moroccans. They have this privileged status because of their employment by American diplomatic or consular establishments; certain persons employed directly by American business firms may also receive protection though to a somewhat more limited extent.[39] Persons who have rendered "signal services" may also be taken under protection.

The judicial functions under this regime of capitulations are in the hands of consular courts. The consul acting as judge may be assisted by American citizens of good repute as associate judges. The law to be applied by these courts is the law of the United States.[40] It might be noted that the French government has maintained on several occasions that the declaration of a state of siege suspends the operation of the consular courts with regard to certain offenses just as it suspends the operation of the French civil courts. The government of the United States has, however, not recognized this standpoint to its full extent. Jurisdiction was conceded to French military courts only in cases where the offense

[37] Cf. "The Abolition of British Capitulatory Rights in the French Zone of Morocco," *The British Yearbook of International Law*, 1939, pp. 58–82.

[38] Cf. Hackworth, *op. cit.*, II, 504 ff.

[39] The attitude of the State Department concerning the protection of persons employed by private individuals or firms is expressed in the documents quoted by Hackworth, *op. cit.*, II, 553–59.

[40] Cf. Hyde, *op. cit.*, I, 460 ff., and the sources quoted there.

directly threatened or affected the security of the French army of occupation.[41]

THE JUDICIAL ADMINISTRATION

Due to the fact that the several groups of the population in the French zone live according to different legal systems, a variety of court organizations exists. They may be divided into three larger units: the French courts, the native secular courts, and the native religious courts.

The French Judicial Organization

The organization of the French courts is based upon a *dahir* of August 12, 1913, as amended. This *dahir* was approved by a decree of the President of the Republic of September 7, 1913. All modifications in the jurisdiction and organization of the French courts has likewise to be approved by presidential decree. There are three types of French tribunals in the protectorate: *Tribunaux de paix* (Tribunals of Peace), *Tribunaux de première instance* (Tribunals of First Instance) and the *Cour d'appel* (Court of Appeal) in Rabat. All these courts exercise criminal as well as civil jurisdiction. There are five Tribunals of First Instance: one each at Casablanca, Oujda, Rabat, Marrakesh, and Fez. Under these Tribunals of First Instance, fourteen justices of the peace function. These latter judges hold sessions not only in the towns where they have their seats but also go on circuit into other parts of their judicial district. The sessions outside the normal seat of the Tribunal of the Peace are called *audiences foraines* (sessions on circuit). All of these French judges are appointed. The appointments were formerly made by the President of the Republic upon proposal of the Minister of Justice and the Minister of Foreign Affairs. At present they are made by the Civil and Military Commander-in-Chief. The justices of the peace sit alone. In the Tribunals of First Instance and in the Court of Appeal the bench consists of three justices.

Jurisdiction in Civil Matters

The jurisdiction of the justices of the peace in civil and commercial cases is restricted to personal suits in which the amount in litigation does not exceed five thousand francs. For certain

[41] Cf. Hackworth, *op. cit.*, II, 614–21.

specified groups of suits, the jurisdiction of the justices of the peace is extended. No limit as to amount in litigation is foreseen, e.g., in cases relating to the engagement of day laborers or in some suits concerning landlord and tenant. In other instances their jurisdiction is limited by higher amounts than ordinarily. No appeal to the Courts of First Instance is allowed as a rule if the amount in litigation does not exceed one thousand francs. Otherwise, such an appeal is permissible.

The Tribunals of First Instance exercise appellate jurisdiction in all cases thus brought before them from the justices of the peace. They further exercise original jurisdiction in all personal suits where the amount in litigation exceeds five thousand francs, in cases involving real estate, and generally in all matters where the justices of the peace do not have jurisdiction. The Tribunals of First Instance are, therefore, the courts of general jurisdiction in civil matters.

The Court of Appeal exercises appellate jurisdiction over all decisions of the Tribunals of First Instance except where appeal is expressly excluded by law. It also decides conflicts of jurisdiction between Tribunals of First Instance.

In principle, the jurisdiction of French courts in civil and commercial matters is confined to the French and to nationals of countries which have given up their capitulatory rights. In personal suits these courts have jurisdiction if at least one of the parties is in the above category. In suits relating to real estate the French courts have, in principle, jurisdiction only if both parties are French or assimilated legally to the French. If a native is involved, the suit has to come before a native religious court. This has its reason in the fact that real estate is governed by the Moslem religious law. There are, however, two exceptions to this rule. One concerns the so-called *immeubles immatriculés* (immatriculated real estate). These are parcels of real estate which have been subjected by a process of registration to French law. This "immatriculation" is usually resorted to in order to make the title to the property more secure than it would be under native law. It has, figuratively speaking, the same effect for real estate that naturalization has for persons—it becomes French for all purposes. It is therefore exempt from the jurisdiction of the religious courts and under the exclusive jurisdiction of the French courts. The other exception concerns suits which involve merely questions of possession and not of ownership. Finally, suits relating to the legal capacity or the

personal status of a Moroccan subject, or to the estate of such a subject, are exclusively cognizable by native courts.

The Criminal Jurisdiction

The distinction of French criminal law between *crimes, délits* (major misdemeanors), and *contraventions* (minor misdemeanors), according to the gravity of the penalty inflicted, has also been applied in Morocco.[42] *Délits* and *contraventions* are often put together under the term *matière correctionelle* (correctional matter).

The justices of the peace have jurisdiction over all *contraventions* which are cognizable by justices of the peace in metropolitan France. Besides, they have jurisdiction over those *contraventions* which, in France, are cognizable by so-called *Tribunaux correctionels* and over all *délits* which are punishable by fines only or where the maximum imprisonment is not more than two years. With regard to the latter category there are some exceptions. On the one hand, some *délits* for which a higher maximum penalty is foreseen are cognizable by the justices of the peace; and on the other hand, some *délits* cannot be brought before them at all. Among those are bankruptcy, abuse of confidence, and others.

The Tribunals of First Instance have jurisdiction over all cases falling into the category of *matière correctionelle* as far as they are outside the jurisdiction of the justices of the peace, and over all *crimes*. In criminal cases the court is supplemented by six *assesseurs* (assessors). Three of these are always Frenchmen, the other three are of the nationality of the accused; they may therefore be either aliens or natives. In principle, the French Tribunals have jurisdiction in criminal matters over all the French and persons legally assimilated to them. In a number of specified cases, however, they have jurisdiction over Moroccan subjects, especially where *crimes* have been committed against French or other Europeans.[43] Appeal in cases belonging to *matière correctionelle* lies to the Court of Appeal. In criminal cases recourse could be had in certain instances to the *Cour de cassation* in Paris.

[42] This distinction is treated in greater detail below p. 107.

[43] *Dahir* of August 12, 1913, art. 6.

The Native Courts [44]

The Native Religious Jurisdiction

Even before the establishment of the French protectorate in Morocco the *cadi,* once the ordinary Mohammedan judge, had ceased to have general jurisdiction and had yielded many of his functions to the officials of the secular administration, the *caids* and the *pashas.* His jurisdiction was narrowed down to cases concerning the personal status of Moslems, their inheritance, and real estate. Criminal matters as well as suits concerning contracts and torts were cognizable by the secular officials. The jurisdiction of the *cadi,* based upon the religious law (the *Chrâa*), is called jurisdiction of the *Chrâa* in contrast to the secular native jurisdiction, the jurisdiction of the *Makhzen.* After the establishment of the protectorate the religious courts were reorganized by a *dahir* of July 7, 1914.[45] This *dahir* regulated the alienation of real estate in its first part and Moslem jurisdiction in civil matters in the second part. Rules for the recruiting and selection of *cadis* were laid down in a *dahir* of November 5, 1937, and an *arrêté viziriel* of June 23, 1938. The *cadis* are appointed by *dahir* after taking an examination. Territorially the religious jurisdictions are organized into *circonscriptions* (circumscription; Arabic: *mahakma*). The *mahakma* is headed by a *cadi de ville* (*cadi* of an urban district) or a *cadi de campagne* (*cadi* of a rural district). *Cadis* of the rural districts do not always have jurisdiction in real-estate cases. Such jurisdiction has to be extended to them by the Moroccan Minister of Justice. The *cadi* is sole judge. However, in all Moslem religious courts an important role is played by the *mufti* who is the legal expert. The *muftis* are not judges but may be consulted either by the *cadi* or by one of the parties and may give their opinion (*fetwa*) which is based upon legal precedents. After the establishment of the protectorate, the authorities tried to curb some of the abuses which sometimes were connected with this institution. For this purpose the *dahir* which was enacted on July 7, 1914, provided that a

[44] A critical evaluation of the native courts in Morocco was given by Henri Bruno, "La justice indigène au Maroc," *A.F.,* XLIII (1933), 74–76, 161–64. He tried to point out the shortcomings of these courts as compared with the French judicial system.

[45] An outline of the organization of these courts in pre-protectorate times is presented by Goulven, *op. cit.,* II, 3–7; cf. also A. Maeterlinck, "Les institutions juridiques du Maroc," *Journal du droit international privé,* XXVII (1900), 477–80.

list of accredited law consultants be drawn up by the Minister of Justice for each locality and be published there. The consultants are prohibited to base their opinion upon a doubtful legal authority or deviate from the questions which are put before them.

From these law consultants one has to distinguish the *oukil,* who is an attorney in our sense of the word and represents the party in court. *Oukils* practise only in the religious courts.

The *cadis* are assisted in their functions by several so-called *adoul* (singular: *adel*) who act as clerks of the court, registrars, and notaries. The procedure before the court of the *cadi* was outlined briefly in the *dahir* of 1914. The judgments rendered may either be contradictory judgments or judgments by default.[46] The system of appeals from these religious courts was considerably simplified by a *dahir* of September 7, 1939 (*B.O.M.,* 1615 f.). According to this enactment, appeal is permissible against all judgments of *cadis* which terminate a suit in first instance. The exclusive court of appeal is the *Tribunal d'appel du Chrâa* (Tribunal of Appeal for the Religious Courts). This Tribunal was first created out of the former *Conseil supérieur d'oulémas* (Superior Council of Legal Experts) by a *dahir* of February 7, 1921. The Tribunal is composed of Moslem judges and a representative of the *Direction des affaires chérifiennes.* The lower religious courts are controlled by officials of the French control agencies acting as delegates of the Sherifian Ministry of Justice.

The Native Secular Jurisdiction

In Morocco this jurisdiction is entirely in the hands of the *caids* and *pashas* who are, both in their administrative and their judicial functions, under the control of the Grand Vizier. As stated above, these officials have jurisdiction in criminal matters as well as in civil and commercial suits. The organization of these *Makhzen* tribunals is regulated primarily by *dahirs* of August 4, 1918, April 8, 1934, and April 23, 1936.

The jurisdiction of the *pashas* and *caids* is limited in several ways. For one thing, all those matters are not cognizable by them which are judicable by the French tribunals, be they criminal or civil. Exempt further are all matters which belong either before the courts of the *cadis* or before the rabbinical courts.

[46] Contradictory judgments are judgments rendered after both parties have been heard. Judgments by default are pronounced in instances where the defendant failed to appear in court or defaulted otherwise.

In addition to these exceptions, their jurisdiction is restricted in criminal matters to cases which are punishable by imprisonment of not over two years or by a fine, the amount of which is not limited. In civil suits the *caids* and *pashas* are not restricted as to amount in litigation. A peculiarity of the system is that the secular officials may pass on to the *cadis* civil cases which involve a special legal question. This shows that the administrative officials are not expected to have any detailed legal knowledge, a point which has been raised against this jurisdiction. Their judgments may be based on equity and if it is possible they will try to achieve a settlement. The procedure in these courts is oral and speedy. However, the lack of legal knowledge often induces the *caid* or *pasha* to decide cases at his will which does not make for consistency of the judicial administration.[47] French control is exercised over these tribunals by so-called *commissaires du gouvernement* (government commissioners) who are attached to every *pasha* or *caid*. They fulfill the functions of government attorneys and, besides, watch over the administration of justice. Maladministration has to be reported to the Grand Vizier. In civil and commercial cases the government commissioner intervenes if the public order is involved; in criminal cases he acts as public prosecutor. The commissioner takes part in the sessions of the court, but he may not lead the debate or interfere with the judgment. He has, however, the right to appeal against any and all judgments of the Tribunal, irrespective of the amount in litigation or the penalty inflicted. Except for this unrestricted right of appeal of the government commissioner, appeal lies to the *Haut Tribunal chérifien* (Sherifian High Tribunal) in criminal cases if the penalty inflicted exceeds three months' imprisonment or a fine of three hundred francs. In civil and commercial matters appeal is allowed if the amount in litigation exceeds one thousand francs.

This well-regulated system of court organization was first extended to the *caids* and *pashas* in the large cities only. In other places the previous and more arbitrary system, functioning without fixed rules and French control, was continued. Extensive criticism was leveled against this state of affairs; and by a *dahir* of April 23, 1926, the rules of procedure and jurisdiction, outlined above, were extended to those judicial districts which so far had been outside the system and had not been under the

[47] Cf. for arguments for and against the *Makhzen* jurisdiction Girault-Milliot, *op. cit.*, 6th ed., p. 392; H. Bruno, *op. cit.*, p. 76.

control of a government commissioner. Some slight differences remained, however, with regard to criminal jurisdiction. These were abolished finally by a *dahir* of April 8, 1934. All secular tribunals now follow the rules of competency laid down in the *dahir* of 1918. There remains one difference. No special government commissioners are assigned to the courts outside the large cities, their functions are fulfilled by the French local control agents.

The court of last resort with regard to the secular native tribunals is the *Haut Tribunal chérifien.* Besides the appellate jurisdiction in cases coming from the courts of *caids* and *pashas,* this Tribunal also has original jurisdiction. The court was created by a *dahir* of August 4, 1918, as amended. The original jurisdiction is restricted to criminal cases which are not cognizable by the lower native secular tribunals. This includes all offenses which are punishable by more than two years in prison and certain offenses specified in article 1 of the *dahir.* Among them are rebellion, attacks against the person of the sovereign or the public peace, homicide, assault and battery if resulting in death or permanent ailment, arson, etc. A government commissioner is also attached to the Sherifian High Tribunal. He fulfills the same functions which the commissioners fulfill in the lower courts. Since the High Tribunal is a court of last resort there is, of course, no appeal. However, there is one exception. Where the *Chambre criminelle* (Criminal Division) of the High Tribunal had entertained a case in exercise of its original jurisdiction, it may be brought before the full court of the High Tribunal if new facts establishing the innocence of the defendant have come to light. This means of redress is called *revision* and may be taken either by the defendant or by the government commissioner.

The character of the *Makhzen* tribunals as secular tribunals has the effect that all Moroccan subjects and persons legally assimilated to them are judicable by these courts. The religious courts, on the other hand, have jurisdiction only over their coreligionists. An exception exists only in the case of nonregistered real estate, suits about which always belong before the *cadi.* In the secular tribunals the functions of attorneys are exercised by *defenseurs agréés* (accredited defense counsel). Usually an attorney is not admitted to practise before both the French courts and the secular native courts.

The Jurisdiction in the Berber Regions

As stated above, it was not the policy of the French to submit the Berber tribes in the pacified regions to the rule of the Islamic law, and their customary institutions were kept in being. In many of these tribes, especially in the Middle Atlas, the judicial functions were not in the hands of *caids* but primarily in the hands of the *djemâa,* which attempted to reconcile the parties. If the reconciliation attempt remained without effect, the case could be brought before one or more arbitrators from whose decision one might appeal to a second or even a third arbitrator.[48] The judgment of the third one was final. This customary jurisdiction was made the object of legislative regulation in the *dahir* of May 16, 1930, as amended, which was followed by an *arrêté viziriel* of April 8, 1934, regulating in more detailed form the procedure to be followed in civil matters. The *dahir* was destined, in the words of its preamble, "to specify conditions under which justice should be rendered in the Berber tribes." By these enactments *Tribunaux coutumiers* (Customary Law Tribunals) were created. The chiefs of the tribes were granted criminal jurisdiction to the same extent as granted elsewhere to the *pashas* and *caids.* In civil and commercial matters the Tribunals have general jurisdiction. Appellate jurisdiction in criminal cases and original jurisdiction beyond the limits set for the Tribunals was originally delegated to French courts. This arrangement was, however, not well received in Morocco and in the rest of Moslem Africa. One was afraid that this might be the beginning of deeper inroads of the French jurisdiction into the Moslem judicial system and in view of the close connection between religion and law in Islam this stirred up violent feelings. It was also pointed out, from a purely legal standpoint, that this sudden introduction of French jurisdiction into a native judicial organization was inconsistent with the basic principles governing the administration of justice in the protectorate.[49] The *dahir* of April 8, 1934, finally altered this situation by abolishing the jurisdiction of the French tribunals and substituting the High Sherifian Tribunal for them. At this court a *Section pénale coutumière* (Criminal Section for Customary Law Cases) was

[48] Cf. M. Morand, "Les coutumes des Berbères marocains," *Mémoires de l'académie internationale de droit comparé,* Paris, 1934, Vol. II, part 1, p. 217. Bruno, "La justice berbère en Maroc central," *Hespéris,* II (1922), 185 ff.

[49] Cf. on all these points the articles by Ladreit de Lacharrière, Ashbey, and Troyes, *A.F.,* XLIV (1934), 9–18.

created. This Section has original criminal jurisdiction over all cases from the Berber territory in which the High Tribunal otherwise would have original jurisdiction in the *Makhzen* territory. It has appellate jurisdiction in all cases originating in the Customary Law Tribunals. A special government commissioner is attached to the Section. Appeals in civil cases have to be brought before the *Tribunaux d'appel coutumiers* (Tribunals of Appeal Applying Customary Law). These Tribunals, having exclusively appellate jurisdiction, were established in the Berber country. No appeal is permissible in personal suits where the amount in litigation is not over one thousand francs. The functions of the government commissioner are exercised by the French control agent in all these tribunals. He has generally to supervise the judicial administration in his area and has an unrestricted right of appeal.

The Rabbinical Tribunals

The secular native tribunals have no jurisdiction in cases involving personal status and inheritance and the religious tribunals handle these suits only where Moslems are involved. There exist, therefore, special *Tribunaux rabbiniques* (Rabbinical Tribunals) for the Jews. They were organized in their present form by a *dahir* of May 22, 1918. The judgments of these Tribunals are either contradictory judgments or judgments by default. They are rendered in Hebrew. The courts have exclusive jurisdiction in matters concerning the personal status or the inheritance of Jews. Appeal lies from these Rabbinical Tribunals to the *Haut Tribunal rabbinique* (High Rabbinical Tribunal), which was organized likewise by a *dahir* of May 22, 1918.

The anti-Jewish legislation established in France in 1940 and 1941 which was taken over in Morocco with some modifications did not touch these specifically Jewish institutions. They were left in being.

RELATIONSHIP BETWEEN THE FRENCH AND THE NATIVE JURISDICTION IN THE PROTECTORATE

As has been seen from the outline given, the French and the native judicial organizations are built up as different branches throughout. There are cases involving natives which are cognizable by French courts and there are some instances in which non-natives might be brought into a native court. Nowhere,

however, is the procedure overlapping in that, e.g., an appeal would lie from a native court to a French court. The only exception concerning the Berber tribunals was abolished in 1934. This existence, side by side, of fully developed French and native judicial systems raises, however, the question which court should have jurisdiction in cases where jurisdiction is either claimed or disclaimed by both French and native courts. Rules to solve such cases were established by a *dahir* of December 12, 1928. If a native court and a French court both claim jurisdiction in a certain case (*conflit positif de compétence*), the native court has to yield. Equally in cases where both the French and the native court disclaim jurisdiction (*conflit negatif de compétence*), the French court has to decide whether it wants to entertain the case. If the decision is in the negative, the native court has to take it. In other words, it is always up to the French courts to decide questions of jurisdiction and the native courts have to yield to their decision.

TUNISIA

LEGISLATION

As in Morocco, the largest part of the legislation of the *Régence de Tunis,* as it is officially called, emanates from the native sovereign, in this case the Bey. The Bey is restricted in the exercise of his legislative functions, on the one hand, by the provisions of the Moslem religious law and much more seriously, on the other hand, by the terms of the protectorate treaties of 1881 and 1883. Within these limits he is, theoretically, the legislator of Tunisia. His legislative enactments are called by the French *décrets beylicaux* (decrees of the Bey). The term is not a particularly accurate one since the decrees of the Bey are not decrees in the sense of the French legal theory which uses this term to connote the legislative acts set by the chief executive on the basis of delegation from the French Parliament. Here the Bey is the original legislator, his legislative power is not delegated. Besides, from a practical standpoint, there is always a slight danger to confuse in quotations decrees of the Bey and decrees of the President. The preparation of the decrees is, again, in the hands of the French. In contrast to Morocco, the preparatory legislative work was not centralized in one agency in Tunisia for a long time. However, in the course of the extensive administrative reorganization begun in 1933 by Resident General Marcel Peyrouton, this

lack was remedied. A *Service juridique et de législation* (Judicial and Legislative Service) was created as part of the *Secrétariat général* in January 1934. This Service is charged with the drafting of the decrees. A *Comité supérieur juridique* (Superior Juridical Council) was established soon afterwards in 1934 but suppressed again in 1941. According to the decree of the President of the Republic of November 10, 1884, all decrees of the Bey have to be promulgated by the Resident General. This gives the French authorities the same powers as in Morocco to bar effectively the introduction of any legislative measure of which they do not approve. On the other hand, just as the Sultan of Morocco and for the same reasons, the Bey has no veto right.[50]

THE CENTRAL ADMINISTRATION

The Tunisian Government

Before the French occupation, the position of the Bey of Tunis was different from that of the Sultan of Morocco because Tunis was under the suzerainty of the Ottoman Empire whereas Morocco had always remained independent. Turkish influence accounts for the fact that the administrative organization, and especially the administrative terminology, differ somewhat from the Moroccan one. The Bey was assisted in the exercise of his functions by the Tunisian Prime Minister and a number of ministers subordinate to the latter. The governmental organization was modified after the establishment of the French protectorate. The cabinet of the native sovereign was not preserved as a purely native body as in Morocco. Whereas the *Makhzen* to this day consists only of the native ministers of the Sultan, the Tunisian *Conseil des ministres et chefs de service* (Council of Ministers and Chiefs of Services) is composed of native and French officials. The administrative reorganization of 1933–34 necessitated some changes in the composition of this Council which were effected by a decree of the Bey of January 9, 1934. The French members are: the Resident General, who is the President of the Council; the delegate of the Resident General who fulfills the functions of Secretary General; the General commanding the troops in Tunisia who acts as Minister of War;

[50] Cf. Girault-Milliot, *op. cit.*, 6th ed., p. 33, n. 1. Milliot, "L'organization française de l'Afrique du Nord, souverains et souveraineté," *A.F.*, XLIII (1933), p. 614, points out that the only measure the native sovereign could resort to would be abdication.

the Vice Admiral, maritime prefect of the Fourth Naval Region (comprising Tunisia and Algeria), who is the Minister of the Navy; the heads of the central departments, and the Judicial and Legislative Counselor, the latter in an advisory capacity. Native members are: the Prime Minister, the Minister of Justice, and the Minister of the Pen (*Ministre de la plume*).

The three Tunisian members of this Council would correspond to the Viziers of the Moroccan *Makhzen*. The Prime Minister fulfills functions which are, in the main, comparable to those exercised by the Grand Vizier in Morocco. He has, however, nothing to do with the judicial administration. The control of the latter is in the hands of a Tunisian Minister of Justice and a French *Delégué à la justice* (Judicial Delegate). The office was created in 1921 [51] and differs considerably from that of the Moroccan Minister of Justice since the Tunisian Minister is primarily concerned with the supervision of the secular jurisdiction. The last of the three native ministers, the Minister of the Pen, is the deputy of the Prime Minister to whom some of the latter's functions may be delegated.

The French Branch of the Central Administration

The representative of the protecting power in the protectorate is the *Résident général,* as in Morocco. This office, in its present form, was created by a decree of the President of the Republic of June 23, 1885. The Resident General is "the depository of the powers of the Republic in the Regency." He exercises the supreme control over all the administrative services in the protectorate, and he alone has the right to correspond with the home government. He acts as Foreign Minister of the Bey [52] and has under his orders the military and naval commanders in Tunisia. He furthermore exercises secondary legislative powers which, as in Morocco, comprise primarily regulations for purely French matters or matters where he acts as Minister of the Bey. Regulatory powers are also conferred upon the heads of the French Services and the Tunisian Ministers. It has to be remarked that all the native ministers, not only the Prime Minister, have regulatory powers. This is different from Morocco where

[51] Decree of the Bey of April 26, 1921; cf. also decree of the Bey of January 25, 1934, which organized the office of the French *Délégué à la justice* in its present form.

[52] Decree of the Bey of June 9, 1881.

only the Grand Vizier may exercise these powers. All subsidiary legislation is enacted by *arrêtés* (orders).

Secrétariat général du gouvernement tunisien (Secretariat General of the Tunisian Government) was created by a decree of the Bey of February 4, 1883. The Secretariat played a similar role to the Prime Minister as the Resident General to the Bey, that is, preparation of the business and control. The reorganization of 1922 led to the suppression of this office. The reasons were partly legal: The *Secrétariat* had had control of both administrative and judicial services, and the reform of 1922 aimed especially at a separation of judicial and administrative functions. Partly, however, they were political, since the power which the Secretary General could wield gave his voice too much weight in political decisions in the opinion of some people. The office was split up and part of its functions went to the Delegate of the Resident General, part to the *Direction général de l'intérieur* (General Department of the Interior), and part to the *Direction de la justice* (Department of Justice). The lack of a centralized agency as intermediary between the Bey and the French authorities in Tunisia made itself felt very soon. The expansion of the French administrative services at the same time also led to allegations from Tunisian quarters that the French were trying to suppress what was left of the native administration and wanted to establish direct French rule. From a purely administrative standpoint, the consequences were also unfavorable since the Secretary General had functioned as a co-ordinator for the different departments. All these difficulties led to another administrative reform which was begun in 1933. In the course of this reorganization the Secretariat General was re-established by a decree of the Bey of October 10, 1933, as amended, and its functions were further defined by decrees issued in the summer of 1937. The chief of the *Secrétariat général* is the Delegate of the Resident General assisted by a *Secrétaire général adjoint* (Deputy Secretary General).[53] The Delegate of the Resident General thus exercises similar functions as in Morocco.

The *Secrétariat général* centralizes the administrative affairs of the Regency. In the course of the extensive reorganizations of 1933 and the following years, several of the independent central departments were suppressed and made part of the *Secrétariat général.* The first to fall was the Department of Justice

[53] Decree of the President of the Republic of October 10, 1933, and decree of the Bey of October 23, 1933.

which was transformed into the *Administration de la justice tunisienne* (Administration of Tunisian Justice). The head of this agency is the *Délégué à la justice* (Delegate for Justice). Other central agencies were likewise transformed and have changed in their composition fairly frequently since, so that it is difficult to give in brief an adequate picture of these developments. Important, however, is the attachment of some services directly to the Resident General. These were primarily the security and control agencies, or more specifically, the civil and military cabinet, the *Contrôle du personnel* (Control of Personnel), *Direction des services de la sécurité* (Department of Security Services), *Affaires indigènes des territoires militaires* (Native Affairs in the Military Territories), and the *Inspection des contrôles civils* (Inspection of Civil Control Agencies). There still exist several independent departments which, as said before, change fairly frequently in their composition. The more important are the *Direction générale des finances, Direction générale des affaires économiques, Direction générale des travaux publics* (General Department of Public Works), *Direction générale des enseignements* (General Department of Instruction), *Direction générale des postes, télégraphes, et téléphones.* A *Direction de l'administration générale et communale* was created in 1937 and suppressed again in 1940. These French central services have a very similar position to the Moroccan ones. They are services of the protectorate and not French services. As in Morocco, the native ministries were not expanded to fill the modern needs but departments with French staffs were organized for that purpose.

When compared with Morocco, the system of central administration appears basically the same. Here and there one finds the dualism in administration, French and native, which is characteristic of the French North African protectorates. There are differences, however, in some details. It has been mentioned already that the Tunisian Council of Ministers differs from the *Makhzen,* which is a native body. Another difference is, especially since the reforms of 1921–22, the greater emphasis upon a division between administrative and judicial functions in the native administration in Tunisia.

Emergency Measures Taken at the Outbreak of the War

The basis for all the emergency measures in Tunisia is the decree of the Bey of September 23, 1938, which adapted to Tunisian needs the metropolitan law of July 11, 1938, on the

organization of the nation in time of war. Like the parallel Moroccan *dahir* (edict), this decree contains dispositions for the employment of manpower and resources in time of war and empowers the Resident General to take all the measures necessary to organize the country on a wartime basis. A state of siege, embracing the same measures as in Morocco, was declared by a decree of the Bey of September 1, 1939. After the start of the Tunisian campaign, General Henri Honoré Giraud appointed a new Acting Resident General for Tunisia in February 1943 who functioned in advisory capacity at Allied headquarters and after the conclusion of the campaign acted provisionally as Resident General until the arrival of the new appointee.

THE TERRITORIAL SUBDIVISIONS AND THEIR ADMINISTRATION

Originally Tunisia was subdivided into tribes. These tribes were not organized upon a territorial but upon a personal basis. The nucleus was the patriarchal family, several families being formed into larger units. The tribe was headed by a *caid,* who was nominated by the Bey and was the representative of the central power. The *caids* were usually chosen from among the large landowners and more rarely from the notables of the tribe itself. Under the *caids* functioned the *sheikhs,* who headed the subfractions of the tribe and were usually chosen by the tribesmen themselves. They represented the tribe in dealings with the central authority. For political reasons the Beys increased the number of *caids,* assigning more than one such official to the individual tribe. After the establishment of the protectorate, the French tried to convert this tribal organization into a regional administration on a territorial basis and to reduce the number of *caids.* The first aim could be achieved fairly easily where the tribes had already become sedentary. It could hardly be accomplished where the tribes were still nomadic. The number of *caids* was reduced considerably from around seventy to around thirty-six.

For administrative purposes, Tunisia today is divided into *Territoires de contrôle civil* (Territories under Civilian Control) and *Territoires militaires.* The civil zone is divided into five regions: Tunis, Bizerte, Kef, Sousse, and Sfax. The regions are subdivided into *circonscriptions de contrôle civil* (circumscriptions of civil control) and *caidats* (native administrative districts). These two types of subdivisions cover the same areas. The circumscription designates the area of the French control agent;

the *caidat,* that of the local native administrator, the *caid.* The circumscription is, as a rule, larger than the *caidat* and takes in several of these latter subdivisions.

The Native Administration

As in Morocco, the *caids* are the representatives of the central native administration. The *caid* exercises administrative, financial, and, in an ever decreasing degree, judicial functions. He is responsible for the peace and good order in his division and has a certain amount of regulatory power which he may exercise with the approval of the Prime Minister. In judicial matters he exercises petty jurisdiction in civil and criminal matters,[54] and in the financial field he acts as tax collector. In this function he is under the control of the Department of Finance. The *caids* are appointed by the Bey as in pre-protectorate times but now upon proposal of the French authorities. While the *caids* are frequently still taken from the same groups as in pre-protectorate times, an endeavor was made during the last twenty years to fill posts with men trained at the seat of the central administration. Each *caidat* consists of several subdivisions which are administered by *kahias* and *khalifas.* The former office was created by a decree of the Bey of June 4, 1912. The *kahia* stands, in rank, between the *caid* and the *khalifa.* The lowest administrative unit is the *fraction,* which is still headed by a *sheikh.* However, the fractions have now become territorial subdivisions, and the *sheikhs* are nominated by the government. They are no longer elected by tribal notables. The *sheikh* acts merely as a local administrator and tax collector. He is charged with the maintenance of peace and order in his *fraction.*

The French Administration

The French exercise their control over the native administration in Tunisia in the same way as in Morocco. A *corps de contrôleurs civils* (corps of civil control agents) was instituted in Tunisia by a decree of the President of the Republic of October 4, 1884, as amended. A new presidential decree, further defining the status of these agents, was issued on December 8, 1935, and was amplified by an *arrêté* of the Resident General of December 11, 1935. The civil control agents are nominated by the President upon proposal of the Minister of Foreign Affairs.

[54] Cf. below pp. 71 ff.

They are charged with the supervision and control of the native authorities in their area. This comprises the native administrative officials in the cities and in the country as well as the *cadis* (native judges). The secular native tribunals, however, are under the control of special government commissioners. Where the *caid* exercises judicial functions, he is therefore under the supervision of the civil control agent with regard to his administrative functions and under the control of the government commissioner concerning his judicial functions. The civil control agent exercises some direct administrative duties with regard to the European population in his area. He registers the French, the Algerians, and the French-protected persons, issues passports, applies the legislation concerning military service of Frenchmen, and so forth.

The military zone comprises the south of the protectorate and is divided into four circumscriptions: Matmata, Nefzaoua, Ouarghamma, and Tatahouine. It is headed by a military commander whose headquarters are at Medenine. The duties of the civil control agents are fulfilled, in the military territory, by agents of the *Service des affaires indigènes* (Service of Native Affairs).

The Municipal Administration

Before the French occupation, the Tunisian state had been strictly centralized and no municipal government had been established anywhere except in Tunis itself. This latter city had had an advisory commission of notables since 1858. A decree of the Bey of January 14, 1914, established a unified municipal administration. Communes are created by decree of the Bey. They are administered by the *Conseil municipal* (Municipal Council) which consists of a native president, one or more French vice-presidents, and a number of French, Moslem, and Jewish councilors. The president is always taken from among the *caids*, but he delegates his functions habitually to the French vice-president. The councils are concerned with a number of matters which are enumerated in article 16 of the decree. Foremost among them are the budget of the commune, loans, and administration and alienation of communal property. All resolutions of the councils had originally to be approved by the Prime Minister before they could become executory. This was altered by decrees of the Bey of August 10, 1938, and April 17, 1941, accord-

ing to which resolutions concerning matters of minor importance become executory without such approval.

By a decree of December 29, 1934, the establishment of a new type of rural commune, the so-called *commune rurale,* was attempted. These communes should have taken in comparatively large areas and were to be subdivided into *sections.* The president had to be one of the *caids* of the territory, with most of the powers delegated to the French vice-president who was to be designated by the Prime Minister from among the members of the *Commission municipale.* This Commission should be composed of French and native members nominated for a term of three years by the Prime Minister. The powers of the Municipal Commission were to be the same as those in the urban communes. Only one commune, Djerba, was organized on this basis at the end of 1935. A new decree for the formation of rural communities was enacted on August 11, 1938. It provided for the creation of so-called *associations communales.* They are rural in character, the president of the *Conseil municipal* is again a *caid;* the vice-president, however, is a *kahia* who acts at the same time as mayor of the commune. The Council consists of delegates of the *cheikhats* (*fractions* headed by the *sheikhs*) to the *Caidat* Council, of the *sheikhs,* and of French councilors nominated by the Resident General if there is a French colony in the area. These new type rural communes are being created by decree and usually comprise the area under the control of a *kahia* or a *khalifa,* only exceptionally covering all of a *caidat.*[55]

THE REPRESENTATION OF THE FRENCH AND NATIVE POPULATIONS

The Councils of the Subdivisions

Advisory bodies were created in each *caidat* and in each region by a decree of the Bey of July 13, 1922, and reorganized by decree of March 27, 1928. The *Conseils de caidat* (Councils of the *Caidat*) are composed of native notables from the different *cheikhats* in the *caidat* and of Frenchmen. The term "notable" was defined by an *arrêté* of the Prime Minister of April 1, 1928. It includes

[55] A thorough discussion of the administration in Tunisia including the reforms of 1933 and the following years may be found in Bou Hasna's articles in *A.F.,* XLVII (1937), 472–76, 545–50, 575–78; and XLVIII (1938), 25–30, 68–72, 207–10, 270–73; Supplement, 290–93.

the native taxpayers of over 25 years of age who are highly regarded generally on account of their social standing, their piety, their advanced age, their education, or on account of services which they have rendered to the state and in recognition whereof they have received certain honorary decorations, such as the Legion of Honor, the Military Medal, the War Cross, or the Nichan-Iftikhar beginning with the third class (officer).

A further prerequisite is residence in the *cheikhat* for at least four years. Nonresidents may qualify in this group if they have held landed property in the *cheikhat* for at least four years. Algerian natives have the same status as Tunisians if they fulfill these conditions. A list of notables has to be drawn up by the *sheikh* upon order and under the supervision of the *caid*. These notables of the *cheikhat* function as an electoral college and designate from their midst four delegates who have to be over thirty years of age. Public officials may not be delegates, and all nominations have to be approved by the Prime Minister. The delegates, on their part, meet in the capital of the *caidat* and elect the members of the Council of the *Caidat* from among themselves. Each Council may have fifty members at the most. Each *cheikhat* is represented by two delegates, in cases where the number of *cheikhats* in the caidat exceeds twenty-five by one delegate. Besides these native members the Council may contain one or more French members nominated by the Resident General. These Frenchmen must have lived in the *caidat* for at least three years. The Council meets in the capital of the *caidat*, under the presidency of the *caid* and in the presence of the civil control agent, at least twice a year for two days at most. The Council is advisory and deals with economic questions. Problems may be put before it by the Prime Minister with the approval of the Resident General. Councils of the *caidat* have been established in the civil zone only, they do not exist in the military territory.

In each of the five regions into which the civil area is divided, there exists a *Conseil de région* (Regional Council). It is composed of representatives of the Councils of the *Caidats*, the Municipal Councils, the chambers of agriculture, the chambers of commerce, the mixed chambers, and the chambers of mining. The delegates from the *Caidat* Councils are elected by the members of these councils in the region. The delegates from the various chambers are elected by the membership of the chambers; the municipal delegates are elected by the French and Tunisian

members of the Municipal Councils in separate elections. The vice-presidents of the regional capitals are members by right of the Regional Councils. French delegates from among the French members of the Councils of the *Caidats* are designated by the Resident General. The Councils meet at dates fixed by the Prime Minister for sessions not exceeding six days. The civil control agents of the region take part in the meetings. The Regional Councils, too, are advisory. They deal primarily with economic questions and public works. The establishment of the budget of the region is also within their province. The budget has to be submitted to the Council of Ministers and Chiefs of Services and has to be approved by it. The Councils may also propose surtaxes on general or special levies.

Grand Conseil (The Grand Council)

This Council is the central advisory body in Tunisia and was created by a decree of July 13, 1922. It replaced the former *Conférence consultative* (Consultative Conference). It was reorganized by a decree of March 28, 1928. The Council is composed of a French and a Tunisian section. The former comprises fifty-six members, twenty-two of whom are elected by the members of the French chambers of commerce, agriculture, and mining. The remaining thirty-four represent the French who do not, by virtue of their occupation, belong to any of these economic chambers. The requirements for the right to vote for delegates to the French section are French citizenship, age over twenty-one years, full civil and political rights, and domicile in Tunisia for at least two years. In order to be eligible, a person has to be over twenty-five years of age.

The composition of the native section was fixed by a decree of the Bey of March 28, 1928, and altered on January 6, 1934, due to political pressure. The latter decree increased the native representation from twenty-six to forty-one delegates. The composition of this section is as follows: three representatives from each of the five regions, one of them representing the municipalities in the region; four representatives of the Medina of Tunis (city and suburbs), one of them Jewish; eighteen representatives of the native chambers of commerce and agriculture; one representative of the Jewish community of Tunis; one representative of the Jewish communities of the Interior; and two representatives from the military zone. The representatives of the regions are elected

by the members of the Regional Councils, and the *Caidat* Councils from among the members of the Regional Councils. The delegates from the municipalities are elected by the members of the *Caidat* Councils and the Regional Council augmented by a second electoral body. This consists of Tunisian notables who have resided in a municipality of the region for at least one year and have received an educational diploma either in the French or the Arabic language, and of certain state and municipal officials. Only persons belonging to this second electoral body may be elected to the Grand Council. The representatives from Tunis itself are elected by an electoral college composed of notables of the city. The representatives of the chambers of commerce and agriculture are elected by the members of these bodies. The Jewish members also are elected. In fact, there remain only two members of the native section who are nominated, namely the delegates from the military zone. They are designated by the Prime Minister with the approval of the Resident General.

The Grand Council meets once a year, in the last quarter of the year, for twenty days in ordinary session. It may be convoked in extraordinary session by decree. As a rule the two sections deliberate separately. The French section is presided over by the Resident General, the Tunisian one by the Delegate of the Resident General or another high French official designated by the Resident General. Both sections meet jointly at the opening and closing of the session and also for the discussion of special questions, by order of the Resident General, or upon demand of at least ten members of one of the sections. Two committees have to be established at the first meeting of each session, the *Commission des finances* (Financial Committee) and the *Commission de l'outillage économique* (Committee for Economic Matters). In each of these Committees the French section is represented by twelve members, the native one by eight.

The most important function of the Grand Council is the examination of the budget. There the powers of the Council are widest. It has the right of detailed discussion and the right of initiative. Certain parts of the budget are excluded from this examination: They are the civil list of the Bey and of members of his family, the expenses for the Court of the Bey, the service of the Tunisian debt and other specially enumerated debts, the salaries of the Resident General and his Delegate, the expenses of the civil and military cabinet of the Resident General, the

expenses of the French judicial administration, and finally, expenses relating to the security of the state.

In legislative matters outside the budget the Council has no right of initiative but may express wishes (*voeux*) for the modification of existing legislation. Discussions of a political or constitutional nature are forbidden. The government may always submit to the Council questions on financial, administrative, or economic problems. Loans may only be contracted by the state, regions, or communes after a favorable advice from the Council has been obtained. The members of the Council have the right to interrogate the government on matters within the realm of the Council's discussion. Uniform advice given by both sections of the Council in budgetary matters may not be disregarded by the government except for reasons concerning the public order or the interests of France. The final approval of the French government is always necessary in these cases. If wishes on other than budgetary matters are expressed, the government has to state in writing in the following session what action has been taken or why it refuses to take action.

In case of disagreement between the two sections the matter is submitted to the *Conseil supérieur de la Tunisie* (Superior Council of Tunisia) which was organized in its present form by a decree of the Bey of February 22, 1934. This body consists of the Resident General as president, the Prime Minister, the Minister of Justice, the Minister of the Pen, the Secretary-General and his Deputy, and the Director General of Finances. It further comprises, besides these official members, delegates from each of the two sections of the Grand Council, namely the vice-presidents, the French and native presidents of the two committees, and eight members elected by the two sections, four by each. The advice of the French section of the Grand Council is put to vote first. Only the delegates from the Council vote—the French first, then the Tunisians. If the French proposal receives the majority in both groups it is deemed accepted; otherwise the advice of the Tunisian section is put to vote in the same fashion. If neither of the proposals of the sections is accepted, the delegates may offer amendments of their own. If that, too, leads nowhere the Director-General of Finances proposes a solution which is deemed accepted if it receives the majority in one of the groups. In case this proposition is not accepted either and no accord can be reached, then the advice of the section which comes closest to the wishes of the government is adopted.

Conseil économique et social (Social and Economic Council)

This advisory body was created by a decree of the Bey of June 28, 1938. It is charged with the study of economic and social problems in order to make proposals to the government for legislation. It consists of seventy-six members: thirty-eight Frenchmen and thirty-eight Tunisians who are representatives of commercial and economic interests, labor and professional groups, and the municipalities. The Council is convoked by the Resident General. Proposals from the Council are submitted to the various services for examination. After this examination the matter may not be discussed again except if permission is given by the Resident General. All political discussions or proposals are prohibited. Propositions from this body do not bind the government in any way.

NATIONALITY AND NATURALIZATION

The problems of nationality and naturalization have a greater importance in Tunisia than in Morocco, primarily because of the existence of a strong nationalistic movement among the native population and because of the prominence of the Italian question. The nationality of persons born in the country was regulated in Tunisia in exactly the same way as in Morocco, by two decrees of November 8, 1921. The one decree, emanating from the Bey, declared as Tunisian all persons born of Tunisian parents or of parents one of whom had been born in Tunisia, with the exception of French citizens and of those aliens whose legal status was assimilated to that of the French. The other decree, issued by the President of the Republic, declared as French citizens, besides persons born of French parents, all persons born of foreign parents if one parent was himself born in Tunisia and was under the jurisdiction of the French tribunals. The problem of extraterritorial jurisdiction, which tends to complicate this question somewhat in Morocco, is absent here as all extraterritorial rights have been abolished in Tunisia. Important political issues, however, have come up. The new decree also applied, among others, to the fairly large Maltese colony in Tunisia. The British government protested against the application of the decrees to the Maltese on the grounds that they were British subjects. During the ensuing dispute between France and Great Britain, the Permanent Court of International Justice was asked by the League of Nations to render an opinion on the problem whether "the nationality decrees issued in Tunisia and

Morocco on November 8, 1921, and their application to British subjects are or are not, by international law, solely a matter of domestic jurisdiction." The Court held that this legislation was not solely a matter of domestic jurisdiction since it applied not to the national territory of the protecting state but to the protected state. The validity and character of the legislation has to be determined, in the opinion of the Court, on the basis of the various treaties relative to the protectorate. This takes the matter automatically into the realm of international law. The emphasis upon the international agreements which form the basis of France's North African protectorates clearly shows that the relationship between protecting state and protected state was regarded by the Court as remaining under the supreme control of international law.[56] The matter itself was not followed up before this Court but was settled amicably by an exchange of notes between the two governments. The result of this settlement was the French law issued for Tunisia on December 20, 1923. This law maintained the principles of the decree of November 8, 1921, concerning the acquisition of French citizenship. It provided, however, that any person who had become a French citizen merely because he and one of his parents had been born in Tunisia could renounce the French citizenship after having reached his eighteenth birthday. According to this law the situation of aliens in Tunisia is thus: The first generation born in Tunisia of foreign parents retains the foreign nationality and can only be naturalized through the normal channels; the second generation born in Tunisia becomes French but has a right of renunciation; the third generation finally becomes and remains French.

An exemption from the provisions of this law was granted to the Italians who retained their Italian citizenship on the basis of Franco-Italian agreements. When Laval and Mussolini concluded treaties concerning the African situation in 1935 it was stipulated that persons born in Tunisia before March 28, 1945, should retain their Italian citizenship; persons born after that date but before March 28, 1965, could claim French citizenship, if they so desired, after becoming of age; persons born of Italian parentage after this date were to be French.[57] This treaty of

[56] The main parts of the opinion are given by Hackworth, *op. cit.*, I, 77–78. Cf. *Revue de droit international privé*, XLIX (1922–23), 1–287.

[57] *Protocole spécial relatif aux questions tunisiennes* of January 7, 1935, reprinted *A.F.*, XLV (1935), 213. The problem of the naturalization and the status of the Italian in Tunisia had been a point of friction between France and Italy for a long time.

1935 was short-lived, however, and was renounced by Italy on December 17, 1938.[58]

The law of 1923 regulated also the French naturalization of Tunisians and of aliens. The Tunisians have a preferred status. They may be naturalized after having reached their twenty-first birthday if they read and write French fluently and if they fall into one of several specified categories. Among these are persons who voluntarily enlisted in the army or navy, have married a Frenchwoman and if children have issued from the marriage, have rendered important services to France, or have received one of a specified number of college degrees.

The last years preceding the outbreak of the war in 1939 were characterized by frequent political disturbances in Tunisia. In the course of these nationalistic outbreaks the situation of the naturalized natives became difficult. The nationalistic movement, the so-called *destour* (Arabic for "constitution") boycotted industrial establishments run by naturalized Moslems, committed violence against them, and especially tried to hinder the burial of these persons in the same cemeteries with other Moslems.[59] Here one sees again the close connection in Islam between law and religion. The naturalized Moslem is judicable by French courts and thus accepts completely the French law. This is, in the eyes of many Moslems, heresy. Italian and German propaganda tried to exploit the situation and thereby further tended to complicate the problem.[60] The situation became very acute, and at the end of 1936 some groups addressed open letters to the President of the Republic and the Bey asking for a return to their former Tunisian status, whereas others protested vigorously against the violence to which they had been subjected.[61]

THE JUDICIAL ADMINISTRATION

As in Morocco, there exists in Tunisia a double set of courts which function independently of each other: the native courts for natives, the French courts for the French and persons legally assimilated to them.

[58] The French reaction to this step and the subsequent legal position of the Italians in Tunisia were discussed by J. Ladreit de Lacharrière, *A.F.*, XLVIII (1938), 418–20.

[59] Cf. *A.F.*, XLIV (1934), 61–62; XLIX (1939), 154–58.

[60] Cf., e.g., the Italian attitude, *Oriente moderno*, XVII (1937), 360–63.

[61] Cf. *A.F.*, XLVII (1937), 98, 336–37.

The French Judicial Organization

The French tribunals in Tunisia are the successors of the consular courts which had existed under the system of capitulations (see above p. 40) prior to the establishment of the protectorate. They were created by a French law of March 27, 1883, adopted by a decree of the Bey of April 18, 1883. It is noteworthy that the reverse procedure of introduction of French courts was followed in Morocco. There the *dahir* came first and was approved by the President in a decree. This is one of the cases where greater regard was shown to Moroccan susceptibilities by emphasizing that even the French courts are formally Sherifian courts, created by a *dahir* of the Sultan. The law of 1883 has remained the basis for the organization of the French courts in Tunisia. It has been amended in details, the most important amendment being contained in the law of July 9, 1941. There were originally only two types of French courts in Tunisia: *Tribunaux de première instance* (Tribunals of First Instance) and *Justices de Paix* (Justices of the Peace). Appeal cases went, until recently, to the Court of Appeal in Algiers (see p. 95). By the law of July 9, 1941, a *Cour d'appel* (Court of Appeal) was, however, established in Tunis. There are four Tribunals of First Instance: one each in Tunis, Sousse, Bizerte, and Sfax. The latter two were established by a French decree of May 13, 1942. Under these Tribunals of First Instance function fifteen justices of the peace. The justices of the peace in Tunisia also go on circuit. The appointment of the French judges in Tunisia is done in the same way as in Morocco.

Jurisdiction in Civil Matters

The justices of the peace have extended jurisdiction in civil and commercial matters. The amount in litigation up to which they have jurisdiction was set in 1942 at six thousand francs. If the amount is below two thousand francs no appeal may be entered. Otherwise, judgments may be appealed to the Tribunals of First Instance. These latter Tribunals have original jurisdiction in all civil and commercial matters which are not cognizable by the justices of the peace. Appeal lies in the Court of Appeal except where the amount in litigation is below three thousand francs. The jurisdiction of the French courts extends to the French, French-protected persons (*protégés français*),[62] and to

[62] Law of March 27, 1883, article 2.

nationals of those powers which have consented to the abolition of their capitulatory rights.[63] The term "French-protected person" does not refer, of course, to the inhabitants of any of the French protectorates in general. The group comprises certain categories of persons who, by tradition, come under the jurisdiction of European tribunals or who are exempted from the native jurisdiction because of their position.[64] Since the United States has no consular courts in Tunisia, American citizens there are judicable by French courts. Algerians in Tunisia are under the jurisdiction of French courts even in cases which, in Algeria, would be cognizable by the *cadi*.

French tribunals have exclusive civil jurisdiction if one of the parties belongs to the group treated above. There are exceptions, however. For one thing, suits concerning personal status or the inheritance of native Moslems or Jews belong before the respective religious tribunals. As far as real estate is concerned, one has again to distinguish between immatriculated and non-immatriculated property. As stated above (see p. 43), immatriculated real estate is French, and the French courts therefore have exclusive jurisdiction. As far as non-immatriculated real estate is concerned, jurisdiction lies with the native religious tribunals if at least one of the parties is native.

The Criminal Jurisdiction

With regard to the criminal jurisdiction of the justices of the peace one has to distinguish between Tunis, Sousse, Bizerte, and Sfax on the one hand, and the rest of the country on the other. In these four cities the justices of the peace may hear only cases involving those *contraventions* (minor misdemeanors) which also in France proper are cognizable by the justices of the peace. In the rest of the country they have extended jurisdiction to the same degree as their colleagues in Algeria on the basis of the presidential decree of August 19, 1854. This jurisdiction comprises all *contraventions* normally cognizable by *tribunaux correctionnels,* offenses against the hunting law, and *délits* (major misdemeanors) which are punishable by imprisonment of not

[63] Decree of the Bey, May 5, 1883. Most European powers conceded speedily to the abolition of their extraterritorial rights after France had established her protectorate over Tunisia. The last foreign capitulations were abolished in 1884.

[64] Cf. Girault-Milliot, *op. cit.*, 6th ed., p. 130. They show as examples for the first category oriental Christians; for the second group, policemen of native origin whose functions extend also to Europeans.

more than six months or a fine of not more than six thousand francs.[65]

At the seat of the Tribunals of First Instance there exist so-called *tribunaux correctionnels* which have jurisdiction over *délits* and over all *contraventions* which are not cognizable by justices of the peace with unextended jurisdiction. Besides, they have appellate jurisdiction in cases cognizable in first instance by the justices of the peace.

Crimes in the technical sense are cognizable by *tribunaux criminels* (criminal tribunals) established in Tunis and Sousse. As in Morocco, the jury system has not been introduced in Tunisia. The criminal tribunals consist of three judges and six *assesseurs* (assessors). They deliberate together on the question of guilt as well as punishment. As in Morocco, three of the assessors are always Frenchmen while three are of the nationality of the accused.

The French law establishing the Court of Appeal at Tunis went into effect on July 1, 1941. The Court consists of two chambers, a *chambre civil* (civil chamber) and a *chambre correctionnel* (correctional chamber) and hears appeals from the Tribunals of First Instance in *matière correctionnelle* (correctional matter) as well as in civil and commercial matters.

The French tribunals have jurisdiction in all criminal cases where offenses have been committed by Frenchmen, French-protected persons, citizens or subjects of other non-Moslem countries, or against such persons.[66] Tunisians are under the jurisdiction of French tribunals in a number of specified cases which were enumerated by the decrees of September 2, 1885, and January 13, 1889. They comprise offenses committed in connection with the exercise of French jurisdiction, such as failure of a native to appear as witness before a French court, perjury committed in a French court, etc. Other offenses falling into this category are based upon certain decrees specified in article 3 of the decree of January 13, 1889. They are primarily infractions directed against telegraph and cable lines, postal property, railroad property, trademarks, copyright, etc. The French courts further have jurisdiction over offenses committed by native soldiers in so far as these offenses are not cognizable by military

[65] Due to the lower value of the currency, fines in penal cases were increased by a French law of July 26, 1941. Its provisions were applied to Tunisia by a decree of the Bey of March 20, 1942.

[66] Decree of the Bey of March 13, 1902.

tribunals.[67] In other words, native soldiers are in penal matters totally exempt from the jurisdiction of the native courts.

The Native Courts

The Native Religious Jurisdiction

The jurisdiction of the religious judge, the *cadi,* is restricted in Tunisia in the same way as in Morocco. Here, too, he may only hear cases relating to the personal status of Moslems, to their inheritance, and to non-immatriculated real estate. All the religious tribunals throughout Tunisia, with the exception of Tunis itself, function according to the Malekite rite. In Tunis there is a Malekite as well as a Hanefite *cadi.*[68] This is a remainder from Turkish times. The Turks are Hanefites, and the Tunesian dynasty still follows this rite. The organization of the religious tribunals was already systematized in pre-protectorate times by a decree of November 14, 1856, which was modified by a decree of May 25, 1876, and again by a decree of December 15, 1896. The *cadi* in the city of Tunis has jurisdiction all through Tunisia. The *cadis* in the other towns are merely his delegates. A case may be brought directly before the *cadi* in Tunis or before the provincial *cadi.* The jurisdiction of the provincial *cadis* is, in principle, restricted to their districts. However, if parties from outside their district appear before them voluntarily they may entertain the case.

Cases which to them appear difficult to solve may be submitted by the *cadis* to the *mufti,*[69] if there is only one, or to the *medjless Charâa* (council of the religious law), which consists of the *cadi* himself and several *muftis.* If the *muftis* are unanimous in their decision, the *cadi* has to follow their opinion. Otherwise he can refer the case to the *cadi* in Tunis for submission to the council of the *Charâa* there. The parties may likewise appeal to the Council. The decision of this latter body is final. The *medjless* of Tunis consists of the *cadis* of the two rites and the *muftis.* The highest two *muftis* are so-called *bach-muftis* and have the title *sheikh-ul-Islam.* It is noteworthy that this

[67] Decrees of the Bey of August 4, 1931, and April 4, 1935.

[68] The Malekite rite is one of the four orthodox Moslem rites and is preponderant in North Africa. The Hanefite rite was introduced in Tunisia and Algeria by the Turks. It has still some adherents in the coastal cities of both countries, though the Malekite rite is prevalent everywhere. Cf. in more detail below p. 117.

[69] Cf. for this office above p. 45.

title was accorded by the Bey to the Malekite *bach-mufti* only recently. Before that only the Hanefite *bach-mufti*, representing the official rite of Constantinople, had this title. Judgments by default were unknown in the Tunisian religious tribunals until 1937, when they were introduced by a decree of the Bey of May 27.

The Native Secular Jurisdiction

The situation with regard to the secular native jurisdiction in Tunisia is different from that in Morocco because of the more developed division of functions. Whereas in Morocco all the secular native jurisdiction is exercised by the administrative officials, native secular tribunals have been established in Tunisia. This gradual division of functions takes in, of course, only the administrative and the judicial branch of government. No division has ever been attempted between the executive and the legislative branch. As a matter of fact, the prevalence of decree-legislation on the part of the central government tends to obliterate the division between executive and legislative functions as far as the overseas possessions are concerned. The judicial branch of government was put under a special regime in Tunisia by the decree of the Bey of April 24, 1921, which created the office of the Minister of Justice. In a proclamation of the same date, the Bey declared that he would relinquish all exercise of judicial functions and would retain only the right of grace.[70]

In consequence of this development there exist at present the High Tribunal for secular native jurisdiction in Tunis, the so-called *Ouzara*, and *tribunaux régionaux* (regional tribunals) with restricted jurisdiction in the provinces. Where there is no regional tribunal, justice is still administered by the *caids* or the *khalifas*. The tendency is, however, to gradually replace the *caids* as judges by regional tribunals.[71]

Tribunals have been established in larger communities in the provinces. The district of each court is determined by an *arrêté* of the Minister of Justice. Each tribunal is composed of a president, several judges, and a clerk. The jurisdiction in civil matters was defined by the Code of Civil Procedure of 1910, as amended. The president of the tribunal, sitting alone, has juris-

[70] Cf. also the address of the Resident General of April 24, 1921. Both the proclamation of the Bey and the address of the Resident General were reprinted in *A.F.*, XXXI (1921), 199–200.

[71] Cf. Bou Hasna, *A.F.*, XLVIII (1938), Supplement, p. 293.

diction in personal suits up to an amount in litigation of five hundred francs. The same jurisdiction is accorded to *caids* and *khalifas* outside the seat of the tribunal. The regional tribunals, as such, have jurisdiction in personal suits if the amount in litigation is over five hundred francs and in possessory actions.[72] No appeal to the *Ouzara* lies in cases where the amount in litigation does not exceed six thousand five hundred francs. No appeal is allowed against the judgments of the president of the tribunal or of a *caid.*

In criminal matters the jurisdiction is divided among three different courts: the *Juge de contraventions* (Judge of *Contraventions*), the *Tribunal régional* (Regional Tribunal), and the *Chambre criminelle de l'Ouzara* (Criminal Chamber of the *Ouzara*).[73] The *Juge de contraventions,* that is, the president of the tribunal or the *caid,* has jurisdiction over the offenses treated in Book 3 of the *Code pénal tunisien* (Tunisian Penal Code), which are all *contraventions,* and over offenses defined in other decrees of the Bey provided that the punishment does not exceed fifteen days in prison or a fine of two hundred forty francs. The regional tribunals have cognizance over all other offenses punishable by imprisonment up to five years or a fine of any amount. The *Chambre criminelle* finally has jurisdiction in all cases which are punishable by imprisonment over five years and over all offenses which are contained in Book 2, Title 1, Chapter 1, of the Tunisian Penal Code. No appeal lies from the judgments of the *Juge de contraventions* and from the judgments of regional tribunals if the punishment inflicted does not exceed three months in prison or a fine of two thousand four hundred francs. Other cases may be appealed from the regional tribunals to the *Ouzara.*

The *Ouzara* itself developed out of a body which heard cases at the seat of the central administration and prepared the decisions for the signature of the Prime Minister and the approval of the Bey. The reform of 1921 transformed this organization into a real tribunal in the Western sense. It functions primarily as a court of appeal for civil and criminal cases decided in first instance by the regional tribunals and has original jurisdiction in the criminal matters discussed above. It consists of a *chambre*

[72] Possessory actions are suits by which a person tries to recover or retain the possession of immovable property. These actions do not settle the question of ownership, they merely determine the actual possession.

[73] Cf. *Code de la procedure pénale tunisien,* articles 3, 4, 5.

civil (civil chamber) for appeals in civil cases, a *chambre correctionnel* (correctional chamber) which hears appeals in criminal cases, the *chambre criminelle* (criminal chamber), and the *Commission des requêtes* (Commission of Requests). This latter body exercises the functions of a court of cassation and may revise the judgments of the other courts. The civil and the correctional chambers have a bench of three judges each; five judges sit in the criminal chamber. The Commission of Requests is composed of a president, who is a French judge, and two judges who are the presidents of the civil and the correctional chambers. The Director of Judicial Services fulfills the duties of general procurator. Two special tribunals exist in the city of Tunis: the *Driba* Tribunal which exercises functions parallel to those of the regional tribunals and the *Orf* Tribunal which is composed of the head of the city of Tunis, the *sheikh-el-medina,* and ten assessors who are merchants. It is a commercial tribunal.

A decree of July 10, 1906, established a body of French *commissaires du gouvernement* (government commissioners) who are attached to the Tribunal of the *Ouzara* and to the regional tribunals. They must be French citizens, know Arabic, and have a law degree. They control the secular native judicial administration and exercise the functions of public prosecutor. They are comparable to the government commissioners attached to the *Makhzen* tribunals in Morocco.

The Rabbinical Tribunals

As in Morocco, the religious Moslem courts have jurisdiction only over Moslems except in real estate cases. Therefore, rabbinical tribunals to judge suits concerning the personal status and the inheritance of Jews have been established in Tunisia too. The organization of these tribunals was fixed by a decree of the Bey of November 28, 1898, as amended. It consists of rabbis who are appointed by the Bey upon proposal of the Minister of Justice. There is no regular appeal from the rabbinical tribunals. In certain cases, however, the judgments may be nullified by the Bey. These are instances where the tribunal had no jurisdiction, where the judgment was rendered upon the basis of a title which was later recognized as forged, where the cause of the action was found to be non-existent, or where a material error had occurred with regard to the object in litigation or the person of one of the parties involved. Also in Tu-

nisia these specific Jewish institutions were left in being under the Vichy regime.

The Mixed Tribunal

Real estate in Tunisia, as in Morocco, was originally all under the jurisdiction of the religious Moslem tribunals. No registers were kept which would show the ownership of real estate. In case of sale the title deed had to be secured from the alleged owner or, where no title deed was available, a sort of affidavit took its place. This system was found very unsatisfactory and insecure, especially from the standpoint of European buyers used to the minute and secure system of continental property registration. A decree of the Bey of July 1, 1885, as amended, made voluntary immatriculation of real estate possible. However, in no case is this registration compulsory. The immatriculation may be demanded by the owner or by persons who have certain real rights with regard to the property in question.[74] Immatriculation requests have to be made public in the *Journal officiel tunisien* and, locally, by the *caid* and the justice of the peace. After a delay of two months, during which period objections may be raised against the immatriculation, the case is transferred to the *Tribunal mixte immobilier* (Mixed Tribunal for Real Estate Cases). This Tribunal is composed of three judges, usually two Moslems and one French; in certain cases the ratio is reversed. It may either approve or reject the request for immatriculation. The decisions of the Tribunal are final. For persons who are under the jurisdiction of the French tribunals the use of the Mixed Tribunal is optional. They may bring their requests for immatriculation or their opposition to it either before that Tribunal or before the regular French courts.

RELATIONSHIP BETWEEN THE FRENCH AND THE NATIVE JURISDICTION IN TUNISIA

This relationship is the same as in Morocco. Also here the two jurisdictions are built up throughout as different branches and do not overlap.

[74] Article 22 of the decree.

Chapter III

ALGERIA

CENTRAL ADMINISTRATION

Algeria is divided for administrative purposes into two distinct parts. The North is administered along the same lines as metropolitan France, whereas the so-called *Territoires du Sud* (Southern Territories) are under military control. The latter comprise the sparsely populated regions stretching into the Sahara. It is often said that Algeria, that is its northern part, is part of metropolitan France. This statement is not quite correct when viewed from the administrative and legal standpoint. It is true that the three departments of Northern Algeria are more closely connected with the mother country than any other colonial territory. However, there are some important differences between this territory and an actual part of metropolitan France. One is in legislation. As stated previously, during the Third Republic all legislation for France proper emanated from the French Parliament; the President had decree power only as far as the Parliament delegated it to him. He could not exercise in metropolitan France any general decree power such as was accorded to him for Algeria. In administration the difference lies in the fact that the Governor General has unified control of Algeria under the general supervision of the Ministry of the Interior. At times when the assimilatory tendencies were strongest in France, there were attempts to put the different services under direct control of the central governmental departments in Paris. This system, however, did not work well and the decrees of August 23, 1898, returned to the unification of control under the Governor General. Some services remained outside and were still directly controlled by the ministries in Paris. Another important fact is that Algeria as such has a separate legal personality and has a special budget. Northern Algeria can therefore neither be called a colony nor can it be termed a part of metropolitan France. It has features of both and a position somewhere in between.

The Governor General

The supreme direction of Algerian affairs in Algeria is vested in the Governor General. He represents the government of the

French Republic and controls most of the services of the territory. Under the Third Republic, the Governor General was nominated by presidential decree upon proposal of the Minister of the Interior. At present the Governor General is appointed by the French Commander-in-Chief.[1] He was under the direct control of the Ministry of the Interior but was allowed to communicate directly with other central governmental departments, in which case he had to keep the Ministry of the Interior informed. He is also allowed to communicate directly with the Residents General of Tunisia and Morocco and with the French Consul in Tripoli. In the field of legislation the Governor General is, in principle, restricted to the enactment of regulations in execution of laws and decrees. Fairly frequently, however, presidential decrees have delegated to the Governor General the power to enact legislation for certain groups of cases. It has been debated in French legal theory whether the President could thus delegate his legislative powers. Though this right has been negated by some scholars, the courts have upheld it.[2] The orders of the Governor General are called *arrêtés* (orders) and are published in the *Journal officiel de l'Algérie*. In administrative matters the Governor General has, in principle, supreme direction. There are some differences, however, between his powers in Northern Algeria and in the Southern Territories. For Northern Algeria these powers are based upon a decree of August 23, 1898, as amended, primarily by decrees of October 23, 1934, and February 21, 1936. In the Southern Territories they are based upon a decree of August 14, 1905. In the North the departmental organization, following the pattern of metropolitan France, places the Governor General in approximately the same position as the Minister of the Interior in France proper. With regard to his control of the central services, one has to distinguish in the North between the *services non-rattachés* (unattached services) and the *services rattachés* (attached services). The first are the services which are under the control of the Governor General and the Ministry of the Interior, the latter are under the direct control of the home ministries. In practice, however, these dif-

[1] Cf. ordinance of February 5, 1943, art. 2.

[2] Cf. for the limitations of this regulatory power, *Conseil d'état*, June 18, 1926, *ex parte* Bentani *et al.*, *Revue du droit public et de la science politique*, XLIII (1926), 708–17. In that case the court held that more important regulatory enactments should be put into effect through normal legislative channels, that is by law or decree, and that the Governor General was overstepping his authority in regulating important issues by *arrêté*.

ferences have tended to become less pronounced. In the Southern Territories, where the departmental system has not been introduced, the Governor General exercises those administrative functions which in the North would be fulfilled by the *Préfets* (Prefects—see p. 84). He was empowered, however, by the decree of 1905 to delegate all or part of these functions to the Military Commanders in the Territories and has made extensive use of this right of delegation. The Governor General has to be consulted with regard to the nomination of all high officials in Algeria and has the power to appoint certain groups of officials. In the North the three Prefects are responsible to the Governor General.

Emergency Powers of the Governor General

A law of April 3, 1878, gave the Governor General the right to declare a state of siege for all or part of the territory if communications with metropolitan France were interrupted. Otherwise the state of siege had to be declared by the central authorities. When the situation in Europe became more critical in the late 1930's, special powers were conferred upon the Governor General. The law of July 11, 1938, on the organization of the nation in time of war, which provided especially for the mobilization of manpower and resources, was extended to Algeria by a presidential decree of September 24, 1938 (*J.O.R.F.*, September 25, 11187). The Governor General was thereby authorized to take all the measures outlined in that law which in metropolitan France were under the control of different central agencies. There were only a few exceptions, especially with regard to those measures in the economic field, which came within the jurisdiction of one special French minister. It was further provided, by this and later decrees, that the Governor General should be allowed to take certain emergency measures. The decree of September 24, 1938, stipulated further that the Governor General may in the case of urgency after the outbreak of war or after mobilization regulate the exportation, importation, use, etc., of foodstuffs and other essential materials as well as order their rationing. All measures taken had to be reported to the central government without delay. By a law of September 20, 1940, the Governor General was provisionally empowered to take by *arrêté* all economic measures necessitated by the circumstances, that is, his powers in the economic field were increased beyond the limits

set in the decree of September 24, 1938. Also in this case a report to the central government had to be made immediately.

A state of siege was declared for Algeria by a decree of the President of the Republic of September 1, 1939 (*J.O.R.F.*, 11026). The effects of a declaration of a state of siege are regulated by the law of August 9, 1849, as amended. The powers of the civil authorities to maintain order pass to the military. The civilian authorities continue, however, to exercise those functions which the military has not taken over. Military tribunals have jurisdiction over more serious offenses, namely *crimes* and *délits* (major misdemeanors) as far as they are directed against the security of the state, the constitution, or public peace. The offender may be a civilian or a soldier. Besides, the right of search, the power to suppress publications or prohibit gatherings considered dangerous is given to the military authorities.

Organization of the Central Administration

The Governor General is directly assisted in the exercise of his functions by a *cabinet civil* and a *cabinet militaire*. The direction of the civil administration lies with the *Secrétaire générale du gouvernement*. This official is a sort of lieutenant governor; he is the Governor General's substitute in case of absence and heads the administrative services as far as these are not directly attached to the cabinet of the Governor General. The composition and jurisdiction of the different central governmental services is defined by *arrêtés* of the Governor General and has been changed frequently. There are several so-called *directions* (governmental departments). Prominent among them are the *Direction de l'administration générale, Direction des affaires musulmanes* (Department of Moslem Affairs), *Direction de la sécurité générale, Direction de l'économie algérienne* (Department of Algerian Economy), *Direction des finances,* and *Direction des Territoires du Sud* (Department of the Southern Territories). This last-mentioned agency is concerned with the central direction of the southern military zone. The *Direction de l'administration générale* as constituted by an *arrêté* of the Governor General of March 29, 1941, comprises the functions of the former *Direction de l'interieur* (Department of the Interior) and of the former *Direction de la santé publique* (Department of Public Health).

By *arrêté* of the Governor General of August 19, 1941, the *Service de législation* was created. It is under the direct control

of the Secretary-General and is charged with the study of laws and regulations of any nature with special regard to their application to Algeria. It further has to prepare the drafts for measures to be enacted for Algeria and co-ordinates the application of the existing legislation among the different Algerian departments. An *arrêté* of the Governor General of September 9, 1941, created the *Comité consultatif de législation* (Advisory Committee on Legislation). It consists of the Secretary-General, the Chief of the Legislative Service, the President of the Court of Appeal of Algiers, the Procurator-General at the Court of Appeal, the Dean of the Law School of Algiers, and the President of the Order of Attorneys at the Court of Appeal. The Committee gives its advice on matters which have to be dealt with by the Legislative Service.

A decree of April 19, 1935, created the *Corps de l'inspection générale de l'administration en Algérie* (Corps of General Inspection of the Algerian Administration). Its officers inspect the administrative services of Algeria.

It has already been mentioned that a basic difference exists in Algeria between the *services rattachés* and the *services non-rattachés*. The latter are called *services civils de l'Algérie* and are under the control of the Governor General and the Secretary-General. The former are under direct authority of the central governmental departments. They comprise the Treasury, Military and Naval Affairs, the *Service de la justice, Service des cultes* (Service for Religious Affairs), and the *Service de l'instruction publique*. The last-mentioned Services do not deal with matters concerning the Moslems. Moslem judicial administration, public instruction, and religious affairs are controlled by special departments which belong to the group of unattached services. The attached services are, however, not completely exempt from the control of the Governor General. He has to receive copies of all reports sent by the Services to their respective departments and also participates in the nomination of some classes of officials of the judicial administration and the Treasury. The distinction between the two groups of services tends thus to be less and less pronounced. As far as military matters are concerned, the Governor General is responsible, according to decrees of December 3, 1916, and June 5, 1918, for all measures taken to insure the defense and security of Algeria. In times of peace, he alone takes the measures necessary to insure the internal security of the country.

CENTRAL ADVISORY BODIES AND REPRESENTATIVE ASSEMBLIES IN ALGERIA

Conseil de gouvernement (Government Council)

This Council is an advisory body to the Governor General consisting exclusively of high officials. It was first formed in 1830 after the occupation of Algiers; its present organization is based upon a decree of August 11, 1875. The Council is presided over by the Governor General and meets once a week. It has to give its advice upon certain specified matters according to a decree of May 25, 1935, as amended. Among these are alienation or encumbrance of parts of the public domain, annulment of deliberations of the *Délégations financières* (Financial Delegations), creation and organization of mixed and native communes, etc. The Governor General is, as a rule, not bound by the advice of the Government Council. Different from the *Conseil d'état* (State Council) in France, which it otherwise resembles in many respects, the Government Council does not have any jurisdiction as an administrative tribunal.

Délégations financières

This assembly constitutes the central representative body of Algeria. It was created by a decree of August 23, 1898, as amended, and consists of delegates of the French citizens and subjects in Algeria. A general prerequisite of the franchise is payment of taxes. There are three Delegations: one is elected by the *colons*, the French colonial farmers; the second by the other French citizens who pay personal taxes; the third by Moslem natives. To be able to vote for representatives to one of the first two Delegations, a person has to have been a French citizen for at least twelve years, to have resided in Algeria for at least three years, and be over twenty-five years of age. The third Delegation consists of two sections: one composed of natives who are not Kabyles (that is, do not belong to the Berber tribes of Northern Algeria), the other of delegates from Kabylia (*Section kabyle*). The representatives of the natives are elected by all native voters inscribed in the electoral lists of the *communes de plein exercice* (communes of full rights) and by the members of the municipal commissions and *djemâas* (native councils) of the *communes mixtes* (mixed communes). That means that only the voters in the communes of full rights

elect their representatives directly. In order to have franchise in a commune of full rights, a native has to be over twenty-five years of age, to have resided for at least two years in the commune, and to have fulfilled certain special conditions as, e.g., to have served in the army or navy, to be the owner or lessee of agricultural property or a sedentary merchant, to be a member of a chamber of commerce or a chamber of agriculture, etc.[3]

Each of the Delegations consists of twenty-four members.[4] In the native Delegation seven of them belong to the Kabylian section. Each delegation, as well as the Kabylian section, meets separately as a rule, once a year in ordinary session. The budget, however, is discussed and voted upon in a joint meeting of the three Delegations (*assemblée plénière*).[5] The vote upon the budget of Northern Algeria is the foremost attribute of the Financial Delegations. It is taken on the basis of a report from the *Commission financière* (Finance Committee) which is composed of four representatives from each of the Delegations. The Delegations have also a vote in matters pertaining to loans for Algeria and to public works. Besides, they may be consulted and may put forward suggestions on other financial and economic matters. No political issues may be discussed; decisions taken in such instances are null and void. The Delegations may be dissolved by the Governor General if they deliberate on questions not within their province or refuse to discuss problems submitted to them. In such a case a commission, nominated by the Governor General and consisting of members of the dissolved Delegations, takes the place of this representative body.

Decisions of the Financial Delegations had, as a rule, to be approved by presidential decree taken in *Conseil d'état*. In cases where a loan had been voted upon by the Delegations or where a concession for public works had been granted, the French Parliament had to approve by law. The budget was transmitted to the *Conseil supérieur* (Superior Council) after it had been approved by the Delegations. The Superior Council also voted on the budget and then passed it on to Paris where it was submitted to parliamentary vote with respect to the taxes imposed therein. Then it was referred to the President for his approval by the Minister of the Interior.

[3] Cf. the decree of February 6, 1919, especially art. 10.

[4] The number of native delegates was raised from twenty-one to twenty-four by decree of June 30, 1937.

[5] Cf. law of December 19, 1900.

Conseil supérieur du gouvernement

This Council as created by a decree of August 23, 1898, constitutes in some respects an upper house of the Algerian legislature. It is presided over by the Governor General and is composed of eighteen members elected by the Financial Delegations (six by each of them, two of the native representatives being elected by the Kabylian section);[6] fifteen members elected by the *Conseils généraux* (General Councils—see p. 85) (five by each of the three Councils); twenty-one members holding their seats by reason of their office;[7] three native notables designated by the Governor General; and four members chosen by the Governor General from among the Algerian officials because of their abilities and meritorious services. The Superior Council is convoked in ordinary session once a year by the Governor General and meets after the session of the Financial Delegations. It has to give its advice on general administrative questions submitted to it by the Governor General. It may also make proposals on administrative matters. All political discussions are forbidden. An important function was entrusted to the Council in budgetary matters by the law of December 19, 1900. As mentioned above, the budget as voted upon by the Financial Delegations is transmitted to the Superior Council for approval. The Council may make changes but must not add any new expenditures or increase any credits voted. Before the opening of the ordinary session a report on the general situation in Algeria is transmitted to the Council by the Governor General. These comprehensive reports contain valuable material on the activities of the different government services. The session itself is opened by a speech of the Governor General on the achievements of the past year.

The Vichy regime had suspended the functions of all Algerian assemblies. By an ordinance of March 17, 1943, General Henri Honoré Giraud revoked the Vichy legislation and reinstituted the assemblies in the form they had had on June 22, 1940. No new elections are to be held until after the liberation of metropolitan France. This means that the life of the assemblies that existed at the time of the fall of France will, in all likelihood, be prolonged for the duration.

[6] The natives had originally only four representatives in the Council. The number was raised to six by a decree of June 17, 1938.

[7] They are the members of the Government Council with some additions, among them the generals commanding the Algerian divisions and the three Prefects.

Conseil permanent de l'économie de la guerre (Permanent Council of War Economy)

This advisory body is of recent origin. It was organized on February 9, 1943, and consists of thirty-nine representatives elected by various economic groups, especially the chambers of commerce and agriculture, labor organizations, and professional groups. Twelve of the members are Arabs. The Council has to give its advice on economic matters.

THE REPRESENTATION OF ALGERIA IN THE FRENCH PARLIAMENT

The principle that Algeria ought to be represented in the French Parliament was first laid down in the constitution of the Second Republic in 1848. In accordance with its assimilatory tendencies, this constitution established a representation in Parliament of Algeria as well as the French colonies. The Second Empire abolished this colonial representation which was re-established under the Third Republic. The departments of Northern Algeria were represented by three senators and by ten deputies. The number of deputies had been fixed at six in 1870, was reduced to three in 1875, and was then gradually increased again by subsequent legislation.[8] Senators and deputies were elected by the French citizens only. The non-naturalized natives had no right to vote. Projects to give them franchise for parliamentary elections were drafted frequently, but none of them was carried out before the fall of France.[9]

THE TERRITORIAL SUBDIVISIONS OF NORTHERN ALGERIA AND THEIR ADMINISTRATION

Départements and Arrondissements (Districts)

Northern Algeria is organized along the lines of metropolitan France. It is divided into three *départements:* Alger, Constantine, and Oran, which are subdivided into a number of *arrondissements.* The Algerian departments are much larger than the departments in France. An Algerian *arrondissement* would

[8] Cf. for the development of the parliamentary representation of French overseas territories R. A. Winnacker, "Elections in Algeria and the French Colonies under the Third Republic," *American Political Science Review,* XXXII (1938), 261–77; on Algeria especially, 266–69.

[9] Cf. on this problem Girault-Milliot, *L'Algérie,* 7th ed., pp. 113–14; G.-L. Jaray, "La politique indigène en Algérie," *Mercure de France,* CCLXXXVII (Oct. 1938), 566–85, especially 580–81.

about equal a metropolitan department in territory. The departments are headed by *Préfets,* the same as in France proper. They are appointed by decree and are, together with their assistants, under the control of the Governor General. The duties of the Algerian Prefects are very similar to, although not quite the same as, those of the Prefects in France. The basic regulation is still the Imperial decree of October 27, 1858, which in its appendices gives a long list of the duties of the Algerian Prefects. These powers have been enlarged and restricted in details by various later decrees and *arrêtés* of the Governor General. The Prefects are, in principle, charged with the supervision and administration of native affairs, with the supervision of the European colonization, and with the local administrative problems of the department in general. They are assisted by two secretaries. The one, *Secrétaire général pour l'administration* (General Secretary for the Administration), has approximately the same functions as the Secretary-General of the Prefect in France. The other one, *Secrétaire général pour les affaires indigènes et la police générale* (General Secretary for Native Affairs and General Police) is charged exclusively with security measures and the supervision of native affairs. He has to have a knowledge of Arabic and of native life. This office was created by a decree of January 11, 1901; the other office had already been established by the decree of October 27, 1858.

Each *arrondissement* is headed by a *sous-préfet* (sub-prefect). He is in charge of the dictrict, and among his most important duties is the inspection of the administrative processes in the area. The functions of the sub-prefects are fulfilled by the Prefects themselves in the *arrondissements* in which the departmental capital is situated.

Departmental Councils

There are two types of councils in the departments, not counting the municipal bodies, the *Conseils de préfecture* (Prefectorial Councils) and the *Conseils généraux.* The *Conseils de préfecture* are modeled after the equivalent bodies in France. The French Councils were reorganized by a decree of September 6, 1926, which was, with several modifications, extended to Algeria by a decree of September 7, 1927. There is one Council in each of the departments. It is composed of a president and two councilors who were nominated by decree upon proposal of the Minister of the Interior. These Councils are technical bodies and

have a dual function. On the one hand; they give advice to the Prefect on any matter which he may lay before them; on the other hand, they function as administrative tribunals. The jurisdiction of the Prefectorial Councils in administrative suits was first regulated by a law of the 28th Pluviôse of year VIII of the era of the First Republic (February 17, 1800), which has been modified frequently since. The procedure to be followed was laid down in a law of July 22, 1889, which was made applicable to Algeria by decree of August 31, 1889. The Councils have limited jurisdiction in administrative matters only; the court of general jurisdiction in administrative affairs is the *Conseil d'état.* The cases which may be brought before the Prefectorial Councils are enumerated in the different enactments. They are, e.g., controversies arising in connection with direct taxation, construction of public works, etc.[10]

While the Prefectorial Councils are composed of officials and fulfill technical duties, the *Conseils généraux* are representative assemblies. The basic enactment for their establishment in Algeria is the decree of September 23, 1875, which, in most respects, reproduces the provisions of the law of August 10, 1871, on the General Councils in France. These enactments have been frequently amended. There is one General Council in each department. The Councils are composed exclusively of elected members who fall into two categories, French and Moslem. The groups which vote for the General Councils are the same as those which elect the representatives to the Financial Delegations. French and Moslem delegates have, in general, the same rights. The General Councils hold two ordinary sessions a year. They deal with the budget of the department; the departmental and municipal surtaxes; acquisition, maintenance, and disposal of departmental property; public works, etc.[11] The matters which come before the Council may be divided into three groups: mat-

[10] Since the functions of the *Conseils de préfecture* in Algeria are, in the main, the same as those of the metropolitan ones, general treatises on French administrative law are best consulted for details. A very brief description of the *Conseil d'état* and the *Conseils de préfecture* is given in Armin Uhler, *Review of Administrative Acts,* Chicago, 1942, pp. 16–18. The book contains a fairly extensive bibliography of French works on administrative law. A critical bibliography of some English and important French works on French administrative law may be found in E. M. Borchard-G. W. Stumberg, *Guide to the Law and Legal Literature of France,* Washington, D. C., 1931. Of basic French books on the subject, H. Berthélemy, *Traité élémentaire de droit administratif,* 13th ed., Paris, 1933, may be mentioned.

[11] Cf. articles 37 ff. of the decree.

ters upon which the Council decides definitively (*statuer définitivement*), matters upon which it deliberates (*délibérer*), and matters on which it gives its advice (*donner son avis*). Decisions falling into the first group have to be executed within twenty days unless the Prefect challenges them because of excess of power or violation of a law or regulation of public administration. Deliberations of the second group are executory unless they are suspended within three months by decree. The budget is prepared by the Prefect, discussed by the General Council, and definitely regulated by decree. A permanent commission is elected by the General Councils at the end of the second yearly session. This so-called *Commission départementale* consists of five French and one Moslem councilors. It meets at least once a month in the presence of the Prefect or his deputy. The Commission, in general, regulates those matters which are transmitted to it by the General Councils, it deliberates on questions referred to it by law, and gives its advice on all problems which the Prefect submits to it. It has special duties in the financial field and makes summary observations on the budget.[12]

The Administration of the Communes

Two types of communes exist in the civil territory of Algeria, the *commune de plein exercice* and the *commune mixte*. In area these communes do not correspond to American municipalities but cover a much larger territory, especially the mixed communes. Both the communes of full rights and the mixed communes are established by *arrêté* of the Governor General.

Communes de plein exercice were organized for metropolitan France by a law of April 5, 1884, which was made applicable to Algeria by its article 164. The commune of full rights is headed by a mayor who, together with his assistants (*adjoints*), is elected by the *Conseil municipal*. The latter body consists of French and Moslem delegates who are elected by the French citizens and the Moslem non-citizens in the commune. The French citizens always retain by law a majority in the Municipal Council. Otherwise the Moslem members have the same rights as the French members. They can, however, not become mayor or assistant to the mayor. The Municipal Council regulates the municipal affairs and gives its advice upon all matters put before it. It also deals with the communal budget and the communal taxes.

[12] Cf. articles 69 ff. of the decree.

The large number of natives in the communes of full rights made it hard for the non-native mayor to handle the problems which presented themselves. For that reason so-called *adjoints indigènes* (native assistants) were created by a decree of April 7, 1884. They were charged with the control of the natives under the supervision of the mayor in communes where the number of natives warranted the establishment of such officials. By a decree of February 6, 1919, as amended, the office was transformed somewhat and the native assistants were given the title *caid*. One or more *caids* may be appointed by the Governor General for communities of full rights in which Moslems are represented in the Municipal Council. The *caids* have authority exclusively over the Moslems and under the supervision of the mayor. Some of their foremost duties are to inform the municipal authorities about all matters pertaining to the maintenance of tranquility in the country, to assist the treasury and the communal officials in the assessment and the collection of taxes, and to control the birth, death, and marriage declarations made by Moslems.

Communes mixtes, the other large group of communes in the civil zone, often cover large territories, sometimes several thousand square miles. Communes of full rights may be located within their confines. Within the mixed communes there are *centres Européens* and native sections formed by the so-called *douar* (native communities). The communes are headed by an *administrateur,* who is assisted by one or several *adjoints* and is the mayor of the mixed commune. The communal assembly is here called *commission municipale.* Its exact composition is determined by *arrêté* of the Governor General. It consists, in general, of the administrator as president, of French members elected by the French citizens in the commune, and of the *caids* and the presidents of the *djemâas* of the *douars* in the commune. The *caids* in the mixed communes are nominated by the Governor General and exercise the same functions as their colleagues in the communes of full rights. The presidents of the *djemâas* are therefore the only elective native element in the municipal commission.

The Native Territorial Organization

The traditional native community in Algeria is the *douar.* These native towns form sections of the communes of full rights and of the mixed communes. The administrative organ of the *douar* is the *djemâa.* Several *douars* together form a tribe,

which, in its turn, has a *djemâa*. However, in Algeria, the tribe is more loosely organized than the *douar,* and the French have made use primarily of the *douar* organization for their administrative purposes. The *douar* and its *djemâa* were entrusted with the control of the communal property by a *sénatus-consulte* of April 22, 1863, and a decree of May 23, 1863. Their actual organization is based upon two decrees of February 6, 1919, one of which re-established the *douars* in the *communes de plein exercice* where they had been abolished. In execution of these decrees, the Governor General enacted several *arrêtés,* notably one on the organization of the *djemâas* of the *douars* in mixed communes on March 5, 1919. As a result of this legislation *douars* are to be found in all the Algerian communes regardless of their type. *Djemâas* may be established for a *douar* or a fraction thereof.

The members of the *djemâa* are elected and on their part elect a president. These presidents are, by right, members of the Municipal Commissions in the mixed communes. They also take part, in an advisory capacity, in the deliberations of the Municipal Councils in the communes of full rights if and when interests of their *douars* are discussed. Besides the control of the communal property, the *djemâas* have charge of many matters which would normally fall within the jurisdiction of a municipal assembly. All resolutions of the *djemâas* are submitted to the Municipal Council or the Municipal Commission. If this body does not approve of them, the Prefect has to decide.

The *douar,* therefore, by and large corresponds to a commune in the ordinary sense of the word, and though it does not have the status of a commune the tendency has been to assimilate it more and more to the communes existing in metropolitan France. As a result, a decree was enacted on August 27, 1937, which organized in Algeria a new type of native community, the so-called *centres municipaux* (municipal centers). These centers were to be established exclusively in mixed communes on the basis of the *douars* and without disrupting the traditional organization of the mixed commune.[18] The municipal centers now have full legal personality and are created by *arrêté* of the Governor General with the approval of the Minister of the Interior. The new commune may comprise a fraction of a *douar,* a *douar,* or several

[18] For the reasons that led to the establishment of these communes, see the letter of the Minister of the Interior submitting the bill to the President, 1935, *J.O.R.F.*, 9836.

douars. The administrative organ of the municipal center is the *djemâa communale* (Communal Council) which is elected. This Communal Council administers the communal property, deliberates on the budget, and on the whole exercises the functions of a municipal council. It is not allowed to make any political proposals or proclamations. The center is headed by a president who, together with two *adjoints,* is also elected. The president acts as mayor of the center.

THE ADMINISTRATION IN THE SOUTHERN TERRITORIES

The basic enactment regarding the present organization of the *Territoires du Sud* (Southern Territories) is the law of December 24, 1902. This law separated the southern parts of Algeria completely from the northern territories under civil control and gave them a special administration and budget. The details of the administration of this new entity were laid down in a decree of August 14, 1905. The Southern Territories are subdivided into four *territoires:* Aïn-Sefra, Oasis, Ghardaïa, and Touggourt. Each territory consists of several *cercles* (circles), *annexes,* and *postes.* The supreme direction of the administration of the Southern Territories is in the hands of the Governor General assisted by the Government Council which, by law, has to give its advice on the budget. Each territory is headed by a Military Commander, nominated by decree upon proposal of the Ministers of the Interior and of War. This Commander is in charge of military as well as administrative matters. The subdivisions are likewise under the control of military officers. Until 1922 so-called *territoires de commandement* (territories under military command) existed also in Northern Algeria. In that year, however, the last such territories were abolished.

A communal organization, somewhat different from that in the North, has been established in the Southern Territories. There are no *communes de plein exercice* and no *centres municipaux.* The main form of communal organization is the *commune mixte.* Besides, there exists a unit which is peculiar to the Southern Territories, the *commune indigène* (native commune). The communal administration in the South is based upon an *arrêté* of the Governor General of May 20, 1868. The mixed commune is headed by an *administrateur* or by the *chef d'annexe* (chief of the annex) who acts as mayor and president of the Mununicipal Commission. The *Commission municipale* is composed of several officials, of French members who are elected by the

French citizens, and of native members who are nominated by the Military Commander of the territory. The organization of the native communes is based upon an *arrêté* of the Governor General of November 13, 1874. The native communes replaced the so-called *communes subdivisionnaires* (subdivisional communes) which had been created in 1868. They often cover a very large territory and are administered by the *chef d'annexe* acting as mayor. The Municipal Commission in these native communes consists of officials and of native notables representing the different *douars*.

THE POLITICAL STATUS AND THE NATURALIZATION OF ALGERIAN NATIVES

Algeria was annexed to France in 1834 and, unlike the situation in Morocco and Tunisia, there does not exist even a nominal native sovereignty in the area. Therefore the natives are under direct French rule, and as to citizenship one has to distinguish between two groups, both of which are French—French citizens and French subjects.

Accession to Citizenship

With regard to the naturalization of Algerian natives a distinction has to be made, at least for the past, between Jews and Moslems. The native Jews in the Algerian departments were declared French citizens by the famous Crémieux decree of October 24, 1870. This decree had been prepared under the Second Empire and was enacted by the Government of National Defense formed after the capitulation of Napoleon III and the proclamation of the Republic. It took its name from A. Crémieux who was Minister of Justice in that cabinet. By this decree the native Jews came under the rule of the French law and obtained the right to vote. A reaction against this mass naturalization soon set in, provoked especially by the outbreak of a serious revolt in Algeria in 1871. As a consequence, a decree of October 7, 1871, tried to restrict the Jewish franchise and citizenship by granting it only to those Jews who had been born in Algeria before the French occupation of the country in 1830 or were descendants of persons resident in Algeria before that time. The legal practice has likewise denied citizenship to Jews resident in regions annexed after 1870.[14]

[14] French legal theory has often expressed a contrary opinion, and some authors even regard the restrictive decree of 1871 as void. Cf. for a brief

The situation of the native Algerian Jews was radically altered under the Vichy regime. The Crémieux decree was repealed by a law of October 7, 1940. This law was later replaced by the law of February 18, 1942, which imposed more stringent rules. The repeal of the Crémieux decree put the Algerian Jews again under the rule of the *sénatus-consulte* (act of the Senate) of July 14, 1865, which had declared the Jews to be French subjects and had also established certain conditions for their individual naturalization. It was, on the whole, a reproduction of a *sénatus-consulte* which, enacted under the same date, regulated the status of the Moslem population. The application to the Jews of the law of February 4, 1919, which facilitated the access to citizenship for certain Moslem groups, was excluded by the law of 1942. No re-establishment of rabbinical courts after the Moroccan or Tunisian pattern was attempted, however. The Algerian Jews remained subject to the French law in all respects. It is needless to say that all the restrictions of the French anti-Jewish legislation applied to them too. Certain exceptions from the provisions of the law of February 18, 1942, were foreseen, however. If a Jew had no criminal record and in addition had served in the armed forces and had been decorated in this or the last war, or if the person was the widow or orphan of a fallen soldier, he could retain his citizenship. By a special decree countersigned by the Minister of the Interior and the Minister of Justice, retention of citizenship could also be granted to persons who had rendered signal services to France. The anti-Jewish measures of the Vichy regime were abrogated by an ordinance of March 17, 1943. The Crémieux decree, however, was not put back into operation again, and the Jews did not regain the French citizenship they had lost by its repeal.

The accession of Moslems to citizenship was basically regulated by the *sénatus-consulte* of July 14, 1865. This enactment stated the principle that a Moslem could, upon demand, become a French citizen. The procedure was fixed by a decree of April 21, 1866, as amended. The basic condition is that the applicant be over twenty-one years of age. This has to be established by a birth certificate or an affidavit drawn up by the justice of the peace (see p. 96) or the *cadi*. Then the native has to present himself for a hearing before the mayor or administrator of his commune who transmits the findings to the Gov-

sketch and further literature on this involved question, Girault-Milliot, *op. cit.*, 7th ed., pp. 277–78.

ernor General. The citizenship is awarded by decree. An even simpler way for achieving French citizenship was devised by the law of February 4, 1919, for certain groups of Moslems. Basic conditions are: the applicant must be over twenty-one years of age, single or monogamic, without criminal record, and must have resided for at least two years in the same commune in France or Algeria, or in a corresponding subdivision in a colony or a protectorate. Besides, one of a number of additional conditions has to be fulfilled. Among them are the reading and writing knowledge of French, honorable service in the army or the navy, ownership of real estate, etc.[15] If these conditions are met, the native may address a petition to the justice of the peace who verifies the statements in a hearing and transmits the petition to the tribunal. Within two months opposition may be voiced by the Procurator of the Republic or by the Governor General. Both may base their opposition on legal grounds, the Governor General also on political grounds. If no opposition is registered, citizenship is awarded.

In spite of this relatively simple and speedy procedure few Moslems make use of the opportunity to become French citizens. The main reason is that they come under French law as a consequence of the naturalization. It is true, of course, that in many respects—e.g., with regard to contracts, torts, and criminal offenses—the Algerian natives are under French law anyway. However, in those fields which for their feeling are most closely connected with religion, namely marriage, divorce, and inheritance, they are still under Islamic law unless they become French citizens. Thus a situation similar to Tunisia prevails. The naturalized Moslem is regarded as a renegade, and the nationalistic movements have tended to accentuate this feeling in the recent past. Just as in Tunisia, frequent incidents have arisen in connection with the burial of naturalized Moslems in Moslem cemeteries. Proposals were made to give the Moslems full civil rights, especially with regard to franchise, without forcing them to renounce their personal status under Moslem law. A bill to that effect was introduced in Parliament by the government of Léon Blum on December 30, 1936. This bill foresaw the granting of complete franchise to certain groups of natives without changing their legal status. Among these groups were primarily former officers and soldiers, members of the representative assemblies, *caids,* etc. The bill did not become law be-

[15] For the complete list cf. article 2 of the law of February 4, 1919.

fore France fell. Opposition against all such proposals came from the French colonists in Algeria, to whom an increase in native votes was undesirable, and from those circles that are in favor of a policy leading to the complete assimilation of native populations to French culture.

Political Status

By the *sénatus-consulte* of 1865, it was pronounced that the native Moslem is a French subject unless naturalized. This status did not give him any civil rights originally. The situation was changed, however, by the law of February 4, 1919. This law regulated in its first part, as mentioned above, the naturalization of certain privileged groups. In its second part it dealt with the political status of Moslem natives who are not French citizens. It stated the principle that the Moslem non-citizens should be represented in all the Algerian assemblies and that they should have the same rights as the French members, with one exception, however—they did not take part in the election of senators to the French Parliament. In an assembly where there are nominated as well as elected native members, the former must not exceed the latter in number. In execution of this law the decree of February 6, 1919, fixed the rules under which a native Moslem could receive franchise for the local assemblies.[16]

The principle that the Moslem natives should have access to public offices and civil service positions under the same conditions as the French citizens was laid down in a law of February 4, 1919. However, native non-citizens cannot be admitted to certain positions of authority. These positions were listed in a decree of March 26, 1919, as amended. Among them are the higher government positions, such as Secretary-General, Prefect, sub-prefect, etc., the judicial positions in the French courts, and a number of higher positions in the technical branches of the government.

THE JUDICIAL ORGANIZATION

In Algeria, too, one has to distinguish between French and native jurisdiction. This jurisdiction, however, is more concentrated in French hands than in the protectorates, and is a

[16] Jaray, *op. cit.*, p. 580, gives the number of natives who thus became entitled to vote as about 100,000 for the Financial Delegations and 400,000 for the Municipal Councils and the *djemâas* of the *douars*. The total number of non-naturalized Algerians in the three departments was five and a half millions according to the census of 1936.

jurisdiction for natives rather than one exercised by native courts. The role of native courts in Northern Algeria, at least, is very restricted.

The French Courts

The French tribunals in Algeria are even more closely modeled after the metropolitan courts than the French courts in the protectorates. There exist the Court of Appeal in Algiers, four *Cours d'assisses* (Criminal Courts), four *Tribunaux de commerce* (Commercial Tribunals), seventeen *Tribunaux de première instance* (Tribunals of First Instance), and one hundred twenty-nine *Justices de paix* (Justices of the Peace).

Justices of the Peace and Their Jurisdiction

In cities where there are Tribunals of First Instance, the justices of the peace have the same civil and criminal jurisdiction as the justices of the peace in France. Outside these places the jurisdiction of the justices of the peace is extended. The rules for the extended jurisdiction are contained in a decree of August 19, 1854, as amended. Civil matters are cognizable up to an amount in litigation of six thousand francs. If the amount in litigation does not exceed two thousand francs, no appeal lies. Criminal cases may be entertained by the justices of the peace, as far as they have extended jurisdiction, if these cases are *contraventions* (minor misdemeanors) normally judicable by *tribunaux correctionnels* (courts for misdemeanors), if they are offenses against the hunting law or *délits* punishable by imprisonment of not more than six months or a fine of not more than six thousand francs.[17]

Tribunals of First Instance

These Tribunals have, in principle, the same original and appellate jurisdiction in civil and penal matters as the corresponding Tribunals in France. In many cases, however, their jurisdiction, both appellate and original, is somewhat more restricted due to the extended jurisdiction of the justices of the peace. All civil cases and all penal cases, with the exception of *crimes,* are cognizable by these Tribunals as far as they are not under the jurisdiction of the justices of the peace. Appeal lies to the Tribunals of First Instance from judgments of the justices of the peace.

[17] This amount was fixed by a decree of February 27, 1942.

The *Cours d'assises*

These courts have the same jurisdiction as their metropolitan counterparts, namely, original jurisdiction over all *crimes*. In contrast to Morocco and Tunisia, the jury system prevails in Algeria and is based upon the same principles as in France. Neither in France nor in Algeria does there exist any grand jury. All juries are trial juries.

Tribunaux de commerce

These Tribunals, too, follow the metropolitan pattern and are the only type of French courts whose members are not appointed but elected.[18] The electors are merchants selected in Algeria from among the merchants inscribed in the commercial registers, one for every ten inscribed. This is different from the situation in metropolitan France. There all the registered merchants have a right to vote. The judges chosen by the electors are also merchants. The Commercial Tribunals have jurisdiction over all commercial matters within their judicial district. Outside the districts the general civil courts exercise jurisdiction over commercial cases.

The *Cour d'appel* (Court of Appeal)

This Court, modeled exactly after the corresponding French courts, extends its jurisdiction territorially over all of Algeria. Until June 1941, when a separate Court of Appeal was created for Tunisia, it extended its functions over the Regency also. The Court of Appeal has, with some minor exceptions, purely appellate jurisdiction in civil matters as well as in *matière correctionelle* (correctional matter), which comprises *délits* and *contraventions*.

All these French courts have jurisdiction over the French and persons legally assimilated to them, and, as shall be seen, also over natives to a very large degree.

The Jurisdiction over Natives

Civil Jurisdiction in the Departments

The civil jurisdiction over natives is, today, divided between *cadis* and French justices of the peace. The basic enactment is the decree of April 17, 1889, which, in its second chapter, regu-

[18] See below p. 108.

lates the jurisdiction of the *cadi*. The *cadis* and the *adoul* (deputies of the *cadis* and clerks of court) are nominated by *arrêté* of the Minister of Justice. The judicial district of the *cadi* is called *mahakma* (principle district), the *bach-adel* (chief of the *adoul*) is the deputy of the *cadi* who may head a subdistrict (*mahakma annexe*), other *adoul* fulfill functions of clerks of court and notaries. In principle the *cadi* has jurisdiction only in cases concerning the personal status and inheritance of non-naturalized Moslems. In these respects the *cadi* has the same judicial powers as the *cadis* in Morocco and in Tunisia. However, the Algerian *cadi* has no jurisdiction in any suits concerning real estate. These very restricted powers of the *cadi* were somewhat extended by decrees of May 25, 1892, and June 11, 1894. According to these enactments, the *cadi* may be authorized to hold court sessions in the market place. In that case his jurisdiction is extended to include personal suits in which the amount in litigation does not exceed two hundred francs. A prerequisite is that the parties agree upon presenting their case before the *cadi*.

All cases which are not cognizable by the *cadis* have to be brought before the justices of the peace. In these suits concerning non-naturalized Moslems there is no difference between the justices of the peace with ordinary jurisdiction and those with extended jurisdiction as far as judicial powers are concerned. Civil as well as commercial suits are cognizable in the tribunal of the justice of the peace. His jurisdiction in these native cases is a general one; that means it is not limited as to amount in litigation. No appeal may be made if the amount in litigation does not exceed three thousand francs in real estate cases or one thousand five hundred francs in other suits.

In these suits the justice of the peace frequently has to apply Moslem law. This is the case primarily where real estate not submitted to French law is involved. In personal suits which do not concern the personal status or inheritance, French law has to be applied as a rule. Even there, however, an exception was made by the decree of 1889. It was stated in that enactment that the judge should pay attention to the laws and customs of the parties in the interpretation of contracts and in the evaluation of facts. In these Moslem cases, the justices of the peace do not follow the ordinary French procedural rules but simplified regulations laid down in the decree of 1889, as amended. The judgments of the *cadis* and of the justices of the peace in Moslem

matters may be appealed, with the exceptions treated above, in the Courts of First Instance. By the decree of May 25, 1892, the *Cour d'appel* in Algiers was given special powers in order to achieve greater uniformity in the application of Moslem legal principles. If a final judgment is found to be "contrary to the law and customs governing the Moslem natives" with regard to their personal status, inheritance, and real estate not governed by French law, then the *Procureur général* (Procurator-General) may demand its annulment. A special division of the Court of Appeal exists for this purpose, the *Chambre des révisions musulmanes* (Chamber for Revisions in Moslem Cases). The Court of Appeal annuls those parts of the judgment which are contrary to the law and renders judgment itself applying "the principles of Moslem law to the facts resulting from the judgment under attack." Its decision is absolutely final, no further means of recourse are possible against it. A demand for annulment may only be submitted by the Procurator-General, the parties themselves have no right to enter it.

In the three Algerian departments, the jurisdiction over natives is therefore for the most part in French hands. Since the French courts frequently apply Moslem law in these cases and the procedure too is somewhat different from the normal one, they might be termed "courts for the natives" to distinguish them from the native courts which are staffed with *cadis*. Peculiar to Algeria is the integration of the courts of the *cadis* into the French judicial system in so far as appeal lies from the court of the *cadi* to the French Tribunals of First Instance. It was further provided by the decree of 1889 that the Moslems may, by express declaration, renounce the application of their laws and submit themselves exclusively to French law in connection with a legal transaction.

Civil Jurisdiction in Kabylia

The Berber tribes of Kabylia did not have any *cadis*. Similar to Morocco, the judicial powers were at one time in the hands of the *djemâas*. After the revolt of 1871, the *djemâas* in Kabylia were disorganized and the situation with regard to the jurisdiction was altered profoundly by a decree of August 29, 1874. This decree completely substituted French justices of the peace for the native Tribunals. According to a decree of December 12, 1908, the justices of the peace of the *arrondissements* of Bougie and Tizi-Ouzou, and of the judicial cantons of Aïn-Bessem,

Bouira, Palestro (all in the *arrondissement d'Alger*), and Mansoura (*arrondissement de Sétif*) have jurisdiction in all civil and commercial cases if the parties are Kabyles, Arabs, or foreign Moslems. Appeal lies from the justices of the peace to the Tribunals of First Instance, except in suits which do not concern the personal status or inheritance and where furthermore the amount in litigation is below five hundred francs.

The decree of 1874 had stipulated that native assessors should sit with the justice of the peace. This was altered by article 83 of the decree of April 17, 1889. It suppressed the institution of assessors and merely provided that the justice of the peace may, on his own motion or upon application of the parties, call in the *cadi*-notary or his deputy. The *cadi*-notary has no judicial functions at all in these parts. If no *cadi*-notary is available, a native notable who is designated beforehand for such purposes takes his place. The native assessor has to be an Arab if the parties are Arabs, a Kabyle if the parties are Kabyles. If the suit takes place between an Arab and a Kabyle, two assessors have to be called in instead of one. One has to be a Kabyle, the other an Arab. The powers of revision of the Court of Appeal outlined above apply also to the Kabylian region.

Civil Jurisdiction in the Southern Territories

The jurisdiction in civil and commercial matters is based upon the decree of January 8, 1870. Contrary to the situation in Northern Algeria, the *cadi* has retained his functions as court of general jurisdiction in all civil and commercial suits arising between Moslems. Appeal lies to a Tribunal of First Instance if the amount in litigation is over two hundred francs in personal suits or over twenty francs in rent in real-estate suits. There is, however, a peculiarity. If a judgment is appealed it is first brought before the *medjless* (council) of the *cadi*, unless one of the parties objects. The *medjless* gives its advice. If the advice is in conformity with the judgment of the *cadi* and if, besides, no questions of status or an amount in litigation of more than two thousand francs are involved, the judgment becomes final and the appeal lapses. In the other cases the appellant has to declare that he upholds the appeal. If such a declaration is made, the appeal takes its normal course. The powers of revision of the Court of Appeal are the same as in Northern Algeria. The parties may likewise by common accord bring their suits before French courts.

Civil Jurisdiction in Mozabite Cases

In 1853 the French took the M'zab region under protection and annexed it in 1882. This region is now part of the Southern Territories and centers around the cities of Ghardaïa, Beni-Isquem, Melika, Bou-Noura, El-Ateuf, Berrian, and Guerara. These are the seven cities of the Abadites. The Abadites, or Mozabites as they are called from the region they inhabit, are a special Islamic sect which stands outside the four orthodox Moslem rites (see p. 117). The sect was formed in the eighth century during inter-Arabic struggles. Adherents of it settled in Africa, and later many Berbers embraced the teachings of this rite. At one time the Abadites formed an important kingdom in that region.[19] Today, the Mozabite population is agricultural and sedentary.

The Mozabites have developed their own legal system and do not follow the legal rules of any of the orthodox rites. After the occupation, and even more so after the annexation in 1882, the French were therefore faced with the question how the Abadites should be organized with regard to jurisdiction both inside and outside the M'zab. In the M'zab the problem was relatively simple. The existing situation was changed but little, and as in the rest of the Southern Territories the *cadis* of the seven Mozabite cities continued to be the courts of general jurisdiction in civil and commercial matters. The rules for appeal which prevail in the Southern Territories are also applicable to the M'zab. The situation was more complex, however, outside the Abadite territory in the Northern Algerian departments. A fairly large number of Abadites live in the coastal regions, and they would not submit, of course, to the judgments of a Malekite or a Hanefite *cadi.* The French were aware of this problem and in a convention concluded with the Abadites on April 22, 1853, they promised that Abadite law would be applied to the Abadites in Northern Algeria. In view of difficulties arising between the Abadites and the orthodox *cadis,* who wanted to exercise juris-

[19] They are also called *Kharidjites* (dissenters), or Abadites (Ibadites) after Abdallah ben Abad their leader, after a split had occurred between a moderate group, the Abadites, and a radical group, the Sofrites. An outline of the M'zab and its life is given by M. Mercier under "M'zab" in the *Encyclopedia of Islam,* Supplement, 1938, pp. 164–67. Among French lawyers who dealt with the laws of the M'zab one might mention E. Zeys, "Législation mozabite," *R.A.,* II (1886), 95 ff., 120 ff., 143 ff.; and M. Morand, *Les kanoun de Mzab,* Algiers, 1910. Further literature may be found in the above-mentioned article of Mercier.

diction over them, the principle was stated again in instructions of the Governor General of November 28, 1866, and, after the annexation, in a proclamation of the Governor General of November 1, 1882. The courts, however, were uncertain about the situation as created by the annexation, and therefore a decree of December 29, 1890, finally established Abadite (or Ibadite) tribunals in the Algerian departments.[20] According to this decree, suits which concern the personal status or the inheritance of Abadites and are instituted outside of the M'zab are cognizable by special *cadis*. *Mahakmas principales* of such *cadis* are at present established in Algiers and Constantine. A *mahakma annexe* under a *bach-adel* exists in Mascara for the department of Oran.[21] These tribunals function according to Abadite law. The principles of jurisdiction, procedure, and appeal are the same as in the courts of the other *cadis* in Northern Algeria. It should be noted the Abadites do not have to bring their suits before the Abadite *cadis;* they may choose a *cadi* of another rite.

Criminal Jurisdiction in the Civil Territory

Criminal jurisdiction over the natives is entirely in French hands. In former times this jurisdiction was characterized by the existence of special tribunals for the natives and by special punitive measures which could be inflicted by administrative officials. The last decades have seen a gradual abandonment of this legislation, at least in Northern Algeria, and a tendency to submit the non-naturalized natives in the civil territory to the same tribunals as the rest of the population. In consequence, the so-called *Tribunaux répressifs* (Tribunals of Repression) were abolished by a decree of May 1, 1930, and all non-citizen natives were submitted to the French courts under principally the same conditions as the natives who had become citizens. That means that they are now judicable by the justices of the peace and the tribunals in the manner described above under French Jurisdiction.[22] However, the *crimes* committed by non-citizen natives

[20] The situation as it existed prior to the decree of 1890 is discussed by L. Rinn, "Les juridictions compétentes en matière de litige interéssant les Mozabites résidents hors du Mzab," *R.A.*, III (1887), 236–44.

[21] The *mahakma principale* of Oran was suppressed by a decree of May 9, 1935, and the *mahakma annexe* was created by an *arrêté* of the Governor General of May 23, 1935.

[22] Certain technical difficulties arising from the wording of the decree were pointed out by an anonymous writer in "La suppression des tribunaux répressifs en Algérie," *R.A.*, XLVI (1930), 159–64.

were still under the jurisdiction of a special *Cour criminelle* (Criminal Court). This Court existed until 1942 when it was abolished by a law of August 5. The jurisdiction over *crimes* committed by non-naturalized natives in the civil territory was transferred by this legislation to the *Cours d'assisses*. In cases where *crimes* are committed exclusively by natives, the jury consists of an equal number of Frenchmen and natives. The criminal jurisdiction over natives in the civil zone is thus exclusively in the hands of the ordinary French courts. The trend towards the creation of special tribunals for the natives has once more been completely abandoned, and an assimilatory tendency has been followed in this respect. The abandonment, however, of the special courts for natives does not mean that the situation of the non-citizen in penal matters is fully assimilated to that of the citizen. The non-citizen natives, whether they live in military or civil territory, may be punished for certain offenses which do not constitute punishable trespasses for the other groups of the population. This is the so-called *régime de l'indigènat* (regime for the natives). It goes back, in the civil zone, to the 1870's and is at present based upon the law of July 15, 1914. This law applies to the civil territory only. Its rules are applicable to all natives of Algeria, the other French African possessions, and of Tunisia and Morocco provided that they are not French citizens. Certain groups, however, are exempt. Foremost among them are natives who are inscribed in the electoral lists,[28] honorably discharged soldiers, holders of the Legion of Honor and certain other decorations, native administrative and judicial officials, etc. The punishments foreseen by the decree may be applied to these exempted groups only if they are condemned to an imprisonment of over three months for a *crime* or a *délit*. The decree of 1914 foresaw both special offenses and special penalties. A long list of such offenses is attached in two tables at the end of the decree. They are all violations of administrative laws, such as the failure to register firearms, non-payment of taxes or fines, opening of religious or educational establishments without due authorization, etc. The jurisdiction over these offenses now lies in the hands of the justices of the peace. The decree of 1914 stated that for five years the administrators in the mixed communes should have

[28] Law of February 4, 1919, art. 14. By an *arrêté* of the Governor General of March 21, 1917, the non-naturalized Algerian Jews were exempted from these penalties.

jurisdiction over these cases. These exceptional powers were renewed in 1922 for another five years but expired finally on December 31, 1927. In the civil territory, therefore, this regime does not now entail any judicial activities of administrative officials. The penalties which the justices of the peace may inflict for the special *contraventions* foreseen in the two tables are *peines de simple police* (police penalties), that is, light fines or short terms in prison. However, the justice of the peace may, either upon his own accord or upon request of the accused, transform the penalty into services in kind such as road building, farm work, or other labor in the public interest.

Among the special penalties, one has to mention as the most important the *mise en surveillance* (putting under supervision). It takes the place of the *internement administratif* which was abolished for the civil territories by the law of 1914. The *mise en surveillance* was introduced provisionally for five years only in 1914, but a law of August 4, 1920, made this institution a permanent one. The penalty may be inflicted by *arrêté* of the Governor General for two years at the most and the culprit may be put under supervision in a tribe, a *douar*, or any other place designated by the Governor General. The Government Council proposes the penalty by a majority of votes. In certain cases the Government Council is also called upon to give its advice upon facts. These instances are acts of hostility against the French sovereignty; all political and religious preachings; all acts against the general security; and all acts which, while outside the complicity range of the Penal Code, favor the theft of crops or animals. A native against whom this penalty had been pronounced could appeal to the Minister of the Interior or to the *Conseil d'état* in France. A report about the cases put under supervision had to be submitted to Parliament annually.

Criminal Jurisdiction in the Southern Territories

In the Southern Territories the criminal jurisdiction is still largely in the hands of military courts and of administrative officials as far as non-naturalized natives are concerned.

All *crimes* or *délits* committed by non-citizen Moslems in the military territory are judicable by military tribunals. Europeans, naturalized Moslems, and Jews were exempted from the jurisdiction of the military tribunals by a decree of March 15, 1860. In order to be cognizable by the military courts an offense has to be committed in the Southern Territories; that is, it makes

no difference where the offender has his residence. On the other hand, offenses committed outside the Southern Territories by residents of the Southern Territories are not cognizable by these tribunals. The composition of the military tribunals is, today, based upon the law on military justice of March 9, 1928. There are three *Tribunaux militaires permanents* (Permanent Military Tribunals) in Algeria. One is in Algiers, which functions for the territory of Ghardaïa; one in Oran for Aïn-Sefra; and one in Constantine for Touggourt and the Oasis.[24] The jurisdiction of the Military Tribunals in the Southern Territories is of course more extensive, especially in peacetime, than the jurisdiction of ordinary military tribunals elsewhere. It does not extend merely to military personnel but automatically to all civilians who are non-naturalized Moslems. However, in judging Moslem civilians the Military Tribunals do not apply military law but civil law, especially the *Code pénal.*

Besides the Military Tribunals there exist in the Southern Territories *Commissions disciplinaires.* These Commissions are purely administrative bodies, their composition and jurisdiction is based upon *arrêtés* of the Governor General, notably upon the *arrêté* of November 14, 1874, as amended. Commissions have been organized in the territories, the circles, and the annexes. A *Commission disciplinaire supérieure* in Algiers was foreseen but never convened. The Commissions in the subdivisions consist of the Commander of the territory as president, a public prosecutor or a justice of the peace, and two superior officers designated by the Military Commander. In the circles and the annexes they are composed of the *commandant de cercle* or the *chef d'annexe* as president, the justice of the peace or his deputy, and an officer, if available, of the rank of captain. The Military Commanders also have the power to inflict punishment of short prison terms or light fines upon the natives. The right to impose very light fines is accorded to the native chiefs. The jurisdiction of the Disciplinary Commissions has been rather vaguely defined. It extends "to all hostile acts, *crimes,* and *délits* committed by non-naturalized natives in the military territory which cannot be brought before civil or military tribunals." A circular of January 4, 1868, gave a list of offenses which should be brought before the Disciplinary Commissions. The list, how-

[24] These tribunals took over all the attributes of the former *Conseils de guerre* (War Councils), cf. decree July 18, 1929. The *Conseils de guerre* had been abolished by the reform of military jurisdiction in 1928.

ever, is not exhaustive. Thus the work of these Commissions is largely on an arbitrary basis.

Administrative Disciplinary Measures Against Non-naturalized Natives

The administrative internment, superseded in the civil zone by the *mise en surveillance,* is still applied in the Southern Territories. It is a purely administrative measure taken by the Governor General without regular proceedings and is often political in character. Other disciplinary measures which may be taken are sequestration of property and collective punishment. Neither is used very much any more.

Chapter IV

LEGAL SYSTEMS IN THE AFRICAN DEPENDENCIES

The law which is applied in French North Africa may be divided into three main groups: French law, Islamic law, and the customary law of the non-Arabized Berber tribes. These three main bodies of laws are co-existent in the territories. Besides these three main groups, several smaller groups have to be considered: Jewish law to a certain extent, and Abadite law in Algeria. That means that, at least with regard to many aspects of private law, each of the groups lives according to its own legal precepts. In other words, the principle of the territoriality of the law—one single legal system for a single territory—is not strictly applied here. French law has, however, made inroads into native law; has replaced it in many cases, especially in Algeria; and has influenced it in other instances.

In the protectorates another large body of legal rules enters into consideration which is not ethnically determined. This body consists of the so-called "laws of the protectorate," that is, those rules which were introduced since the establishment of the protectorates over Morocco and Tunisia. The laws of the protectorate may, and often do, apply to all the inhabitants and thus constitute the territorial law of the area. These laws are composed mainly of two basic elements: French law and Moslem law. However, pure Islamic law, pure French law, and customary law come into play again, especially where the protectorate law has made no provisions. The field of the protectorate law is larger in Morocco than it is in Tunisia. In Algeria no equivalent to the protectorate law exists, but French law has in many respects taken over the role of a territorial law applicable to all inhabitants. In the following some of the main characteristics of the different legal systems will be described, though it is impossible, of course, to go into details in the framework of this book.

THE FRENCH LAW

France is a so-called "civil law country," which means that a good deal of its law is based upon the principles of the Roman

law. It shares these characteristics with most of the other laws of the European Continent which thus form a group different in many respects from the group of Anglo-American laws. As in most of the continental countries, the bulk of the French law, both substantive and adjective,[1] is contained in codes. The most important codes were enacted under the rule of Napoleon I. They are the *Code civil,* which was originally called *Code Napoléon,* the *Code de procédure civile* (Code of Civil Procedure), *Code de commerce, Code pénal,* and *Code d'instruction criminelle* (Code of Criminal Procedure). All these codes have been amended frequently since their introduction at the beginning of the nineteenth century. Besides, there exist minor codes and a great number of statutes of general application. The latter are often referred to as *lois usuelles* (laws in use). These codes and statutes together form the basis of the French legal system. Court decisions, especially the decisions of the *Cour de cassation,* have a great importance in legal practice but precedents do not have the force they carry in Anglo-American law.

All of the five large codes are subdivided into several parts or books. The Civil Code consists of a brief *Titre préliminaire* (Introductory Title) and three books. The Introductory Title deals in six articles with the publication, promulgation, effect, and application of laws. The first book, *Des personnes* (Of Persons) treats the legal status of natural persons, marriage, divorce, relations between parents and children, adoption, and incompetency. The second book, *Des biens, et des différentes modifications de la propriété* (Property and Its Various Modifications) deals with personal property, real estate, and the rights pertaining thereto. Book three finally is entitled *Des différentes manières dont on acquiert la propriété* (The Different Ways to Acquire Property) and deals with fairly diverse matters. These are wills and inheritance, contracts and torts, mortgages, liens, and the statute of limitation.

The Code of Civil Procedure is divided into two parts. The first contains five books and deals with the regular procedure before justices of the peace, the Tribunals of First Instance, and the Courts of Appeal, as well as with the execution of judgments. The second part deals, in three books, with special procedures including the settlement of estates.

[1] Substantive law is the set of legal rules which give recognition to legal rights and duties. These rules are the very foundation and substance of law. Adjective law comprises the rules of procedure, that is, the rules for the enforcement of legal rights.

The Commercial Code contains both rules of substantive and of adjective law as applied to commercial relations. Book one deals with commerce in general; that is, with merchants, corporations, agents, exchanges, and commercial transactions. Book two contains some, but not all, rules of maritime commerce. Book three treats failure and bankruptcy. This book especially has been widely amended. Book four finally contains the rules of procedure in commercial cases, including the organization of the commercial courts. A good deal of the law merchant is, however, contained in statutes introduced after the enactment of the Commercial Code.

The substantive criminal law is contained in the Penal Code. French criminal law distinguishes among three types of criminal offenses: *Crimes,* which are serious offenses punishable by death, imprisonment with hard labor either for life or for a prescribed period, or imprisonment with labor for from five to ten years. To this might be added the loss of political, civil, and certain personal rights. The penalties are different where political *crimes* are concerned. In the second category are the *délits* (major misdemeanors) which are less serious offenses and are punishable by imprisonment with labor for not less than six days or for more than five years; deprivation of certain political, civil, and personal rights for a fixed period; or a fine of more than one hundred eighty francs. In the third category are the *contraventions* (minor misdemeanors) punishable by imprisonment for not more than five days, a fine not exceeding one hundred eighty francs, and confiscation of articles employed in committing the *contravention* or produced by it. The classification of an offense is thus based entirely upon the punishment foreseen for it in the law. An offense may therefore be transferred from one category to the other if the penalty is altered by the law. The Penal Code regulates in its first book the penalties inflicted for *crimes* and *délits.* The second book deals with responsibility for the criminal act, the rules applicable to accomplices, minors, and incompetents. Book three gives a catalogue of particular *crimes* and *délits,* and the fourth book finally deals with the *contraventions* and their punishment.

The Code of Criminal Procedure is divided into two books. The first deals with the judicial officers concerned in the prosecution of offenses and their duties, the second with the organization of criminal jurisdiction.

The differences between French and American substantive law are manifold and cannot be treated here. Some general char-

acteristics of the court organization and the adjective law which serve also to explain the French judicial organization in North Africa will be dealt with.

All judges in French courts, with the exception of the judges of the commercial courts, are appointed. The appointments in North Africa are at present made by the French Civil and Military Commander-in-Chief. The interests of the government are represented in court by members of the so-called *ministère public* (office of public prosecution).[2] They function in both civil and criminal cases; in the latter suits they fulfill the duties of a public prosecutor. They are appointed civil service officials and form a hierarchy under the Minister of Justice. In the lower courts the Prosecutor has the title *Procureur de la République*. A *Procureur général* is attached to each Court of Appeal. He has a number of deputies known as *avocats généraux* (Advocates General) and *substituts*. The *Procureur général* is the chief of all the Prosecutors in the judicial district (*ressort*) of the Court of Appeal and supervises their activities. The Prosecutors attached to a particular court are collectively referred to as *parquet*.

It is a prominent feature of French law, as well as of most of the other continental European laws, that the preliminary investigation of serious offenses, especially *crimes*, is in the hands of a judge, the *Juge d'instruction* (Investigating Judge). The task of this Judge is to gather the material and to prepare the case for trial. He collaborates with the Prosecutor and hears witnesses and the defendant. The proceedings before this Judge are not public. On the basis of the evidence gathered, the Judge decides whether an offense had been committed, and if so into which category it would fall. If he is of the opinion that it constitutes a *crime* in the technical sense, he turns his material over to the *Procureur général* in order that an indictment may be obtained in the competent court—the *Cour d'assises* in France and Algeria and the court having jurisdiction over *crimes* in Tunisia and Morocco. In this procedure leading to the indictment (*mise en accusation*), no grand jury takes part. Its place is taken by a special body of three judges who form the so-called *Chambre des mises en accusation*. This Chamber decides, on the basis of the evidence laid before it and without any further hearings, whether an indictment should be handed down or not. During this

[2] To the following cf. E. R. Keedy, "The Preliminary Investigation of Crime in France," *University of Pennsylvania Law Review*, LXXXVIII (1940), 389–91.

period of preliminary investigation the suspect is often held in *détention préventive* for fairly prolonged periods.[3] The system of bail is not as elaborate as in America. In the trial itself, a petty jury takes part in France and in Algeria; it is replaced by *assesseurs* (assessors) in Tunisia and Morocco. The jury decides the question of guilt; a majority vote is sufficient; no unanimity needs to be reached. This procedure is only employed where *crimes* are concerned. No jury is used in cases of *délits* and *contraventions*. A preliminary investigation by an investigating judge has to take place in the case of *crimes*, may take place in the case of *délits*, but never takes place in the case of *contraventions*. *Délits* come before *Tribunaux correctionnels* or justices of the peace with extended jurisdiction. In the *Tribunaux correctionnels* and in the *Cours d'assises*, the bench consists of more than one judge, three as a rule.

No jury is ever employed in civil cases. In the Tribunals of First Instance, the bench as a rule consists likewise of three judges. An exception to the usual composition of the French courts is constituted by the commercial courts. All judges of the commercial courts are elected. In France the voting right is accorded to all merchants who are inscribed in the commercial registers. The differences encountered in Algeria have been stated above.

The court of last resort in France, before which cases from the French courts in the overseas possessions could also be brought in certain instances, was the *Cour de cassation* in Paris. Civil and criminal cases could be laid before this Court for review.

In France the judicial control of administrative acts is in the hands of separate administrative courts.[4] This is again a feature common to most continental European laws. The highest administrative court was the *Conseil d'état* (State Council) in Paris. Limited administrative jurisdiction is exercised by the *Conseils de préfecture* (Councils of the Prefectures). No separate administrative tribunals have been established in Morocco and in Tunisia, and the judicial review of most administrative acts is in the hands of the ordinary civil courts there.

The French system of military jurisdiction has also been applied to North Africa. A revised *Code de justice militaire* was enacted by a law of March 9, 1928. On the basis of this law

[3] *Ibid.*, pp. 701–5.

[4] Cf. Armin Uhler, *Review of Administrative Acts*, Chicago, 1942.

Tribunaux militaires permanents were established in the overseas territories by a decree of October 16, 1928. They replaced the former *Conseils de guerre* (War Councils). Three such Tribunals exist in Algeria; three in Morocco—at Casablanca, Meknes, and Fez; and one in Tunisia. Due to the war and the declaration of a state of siege, the jurisdiction of the Military Tribunals has been extended considerably and now also takes in civilians. In peacetime, recourse against decisions of the Military Tribunals could be had to the Court of Cassation in Paris. The law of 1928 foresaw, however, the establishment of *Tribunaux de cassation permanents* in time of war. Such a tribunal has been established for the North African possessions in Algiers. It may be mentioned that in Morocco as well as in Tunisia native members of the military forces are judicable by the ordinary French courts in peacetime as far as the offenses do not belong before the Military Tribunals. That is, they are totally exempt from native jurisdiction. For the Sherifian Guard, the body guard of the Sultan, special *commissions judiciaires* (judicial commissions) were created.

APPLICABILITY AND INFLUENCE OF FRENCH LAW IN NORTH AFRICA

Algeria

As stated above, all legislation of general application enacted in France prior to 1834 became applicable to Algeria by virtue of the annexation. This includes the large codes, especially those dealing with substantive law. The Code of Civil Procedure was applied to Algeria only with certain modifications by a royal ordinance of April 16, 1843. The criminal procedure is likewise based upon the French code with certain modifications in detail. A large amount of special legislation due to the peculiar circumstances in Algeria has, of course, been enacted. Where such special statutes exist they have to be applied.

The French citizens in Algeria are under the exclusive rule of the French law with only those modifications as were introduced by special statutes. The same is true for persons legally assimilated to the French. To the native non-citizens partly French law and partly native law has to be applied. In this connection one has again to distinguish between the civil zone and the military territory. For the civil zone the problem was regulated by the decree of April 17, 1889. Non-citizen Moslems remain under

the rule of their native law with regard to their personal status, inheritance, and those parcels of real estate which have not come under French law in consequence of the law of July 26, 1873. In other matters, and especially in criminal matters, the Moslems too are under the rule of the French law. The situation is somewhat mitigated by the provision discussed above [5] that the judge should take into account the customs of the parties when judging personal suits. The parties may renounce the application of their law and customs, even in cases concerning their personal status, inheritance, or real estate. Such a renunciation may either form part of the original contract or may follow tacitly from the fact that the agreement in question was concluded before a French official. It may also be contained in a special subsequent agreement. If such a renunciation has taken place, the case is treated according to French law. Outside the civil territory the natives are under the rule of their native law with regard to all civil and commercial matters,[6] but in criminal matters French law is applicable.

These rules give French law a preponderant position, especially in the civil territory, which has given rise to many discussions. The law of 1889 had abrogated the stipulations of the *sénatus-consulte* (act of the Senate) of July 14, 1865, that the Moslems should stay under the rule of Islamic law.[7] It was frequently argued that the application of French law to the Algerian Moslems was contrary to the convention of July 5, 1830, which was signed following the capitulation of Algiers. Article 5 of that document guaranteed free exercise of the Mohammedan religion.[8] From this stipulation it was deducted by some writers that France had taken over the obligation to respect Moslem law since Moslem law is part of the religion.[9] Issue was taken with this opinion by others, and it was declared that the convention of 1830 first of all concerned only the city of Algiers itself and besides contained merely the promise of the victorious Military

[5] Cf. p. 96.

[6] Cf. Imperial decree of January 8, 1870, art. 5.

[7] Art. 1: *L'indigène musulman est Français, néanmoins il continuera à être régi par la loi musulmane.* (The Moslem native is French, nevertheless he continues to be under the rule of the Moslem law.)

[8] The text of the convention of 1830 may conveniently be found in G. Hanotaux-A. Martineau, *Histoire des colonies françaises et de l'expansion de la France dans le monde, L'Algérie,* Paris, 1930, II, 109.

[9] These opinions are quoted by E. Norès, *L'oeuvre de la France en Algérie, la justice,* Paris, 1931, pp. 367 ff.

Commander to respect life, property, and customs of the conquered people. Consequently this agreement could not be construed as containing any general rules. At present this latter view seems to be prevalent among most of the French authorities [10] and, however one may look upon it from the formal or political side, the fact remains that French law is applied to Algerian natives to a fairly large extent.

Tunisia

The French courts in Tunisia apply French law, including the French codes. These codes have never been formally introduced in the Regency and their use by the French courts may be justified, legally, on two counts. One is the fact that the French courts continue the tradition of the French consular courts which existed before the establishment of the protectorate in 1881 and which, of course, applied the national law. The other is the application of the principles of conflict of laws which, in many cases, put the French under the rule of their law.

In Tunisia itself a comprehensive codification of the law was undertaken and four codes applicable to the Tunisians were issued. These codes regulate substantive law and procedure. A commission was charged with the codification of the Tunisian legislation in 1896. A draft for a Tunisian civil and commercial code was prepared by Santillana and printed in 1899. However, though this project was adopted by the commission, it was never enacted in its entirety. Only part of it became law on December 16, 1906, under the title *Code tunisien des obligations et des contrats*. It went into effect on June 1, 1907, and consists of 1,632 articles. The Code is divided into two books: book one deals with obligations in general, book two with the individual types of contracts. The work is under strong French influence, especially with regard to the organization of the material. It contains, however, a number of types of contracts which are exclusively Moslem. In other matters it endeavors to combine French and Moslem rules, especially with regard to the proof.[11] It is important to note that according to a decree of the Bey of June 30, 1907, the Code does not apply to claims, debts, or, in general, any other obligation of the state, communes, or other public corporations. As to them, the legislation prior to the

[10] *Ibid.*

[11] This code was critically discussed by E. Larcher, *R.A.*, Vol. XXIII (1907), part 1, pp. 193–99.

Code is still in force, which means that all stipulations of the Code contrary to that legislation are not applicable.

The *Code tunisien de procédure civil* was enacted by a decree of the Bey of December 24, 1910, and went into effect on June 1, 1911. It consists of four titles. The first deals with the jurisdiction of the different courts in general; the second treats the procedure in the courts; the third contains the rules for the execution of the sentence; and in the fourth, general provisions may be found. The Code applies only to natives who are judicable by a native court; furthermore, all suits concerning the personal status, inheritance, or real estate are exempted. In other words, the Code is only in use in the secular native tribunals and is neither applicable in the French courts in the Regency nor in the native religious courts. This Code, too, is under strong French influence. It contains, however, certain features which make it more modern than the French Code of Civil Procedure, notably in that it regulates the jurisdiction of the courts in one of its titles.[12] This subject matter is not contained at all in the French code and has to be looked for in other French statutes. The Code of Civil Procedure does not apply to the group of cases which are exempted from the Code of Obligations and Contracts.

A *Code pénal tunisien* was promulgated on July 9, 1913, and went into effect on January 1, 1914. It is divided into three books: the first contains general rules, the second treats the more serious offenses and their punishment, and the third finally deals with *contraventions* (Arabic: *moukhâlafat*). The Code is modeled fairly closely after the French Penal Code, especially with regard to the definitions given for the individual offenses and the penalties foreseen. As in France, the type to which an offense belongs is determined exclusively by the punishment prescribed. However, *crimes* and *délits* are treated together in book two under the collective heading *infractions*. All offenses punishable by an imprisonment of more than five years are classed as *crimes;* all offenses punishable by sixteen days in prison at the most are *contraventions*.[13]

The last Tunisian code to be enacted was the *Code de procédure pénale*. It was promulgated on December 30, 1921, and

[12] A brief evaluation of the Tunisian Code may be found in A. Tissier, *R.A.*, Vol. XXVII (1911), part 1, pp. 129–32.

[13] E. Larcher has reviewed this Code in *R.A.*, Vol. XXIX (1913), part 1, pp. 241–49.

went into effect on March 1, 1922. The Code is divided into two books. The first one contains rules similar to those found in the corresponding French code; the second book deals with the different tribunals and the procedure applied by them, with appeal, execution of the penalty, rehabilitation, etc. Since the *cadi* (religious Moslem judge) has no jurisdiction in criminal matters, this Code again applies exclusively to the native secular jurisdiction. It is strongly influenced by French law. The introduction of public prosecution on the French model is, of course, an innovation. So is the deviation from the Moslem system of proof which bound the judge to observe certain strict rules in evaluating the evidence. No jury system was introduced but the principle of a bench of several judges is applied where *crimes* come before the court. The technical rules for the appeal and the revision of judgment also follow French lines.

To summarize, the French tribunals in Tunisia base their jurisdiction exclusively upon French law. The native secular tribunals apply the Tunisian codes, treated above, which constitute a mixture of French and Islamic law. Questions relating to the personal status of Moslems and Jews, to their inheritance, and to non-immatriculated real estate finally are under the exclusive rule of the native law.

Morocco

In Morocco several large codifications were undertaken upon the initiative of Marshal Lyautey soon after the establishment of the protectorate. The new legislation was prepared by a commission in Paris and was enacted by a *dahir* (edict) of the Sultan of August 12, 1913. It comprised the *dahir* dealing with the legal position of the French and of foreigners, a *Code des obligations et contrats,* a *Code de commerce,* a *Code de procédure civil* and a *dahir* on some features of criminal procedure. At the same time *dahirs* on judicial fees, on the immatriculation of real estate, on assessors in criminal matters, and on the status of the court assistants were enacted. A *Code de commerce maritime* was enacted later on March 31, 1919.

The Code of Obligations and Contracts was modeled closely after the pattern of the Tunisian code of the same name, though it is somewhat abbreviated as compared with that code. It is divided into two books dealing with the same subject matters as the Tunisian counterpart. It consists, however, of only 1,250

articles as compared with the 1,632 articles of the Tunisian code. The Moroccan code also shows the same mixture between Islamic and French law which is characteristic for the Tunisian enactment.

The Commercial Code does not have any Tunisian counterpart. It follows very closely the French Commercial Code and is divided into two books. Book one deals with law merchant in general, just as the first book of the French code and in the same order. Some of the subjects treated in the French code which have little bearing on Moroccan affairs, as, e.g., the title on commercial exchanges, are left out. Book two corresponds to book three of the French model and copies the French provisions to a very large degree. The second book of the French code was made the subject of a separate enactment, the Moroccan Code of Maritime Commerce. Since no special commercial tribunals exist in Morocco, no counterpart to the fourth book of the French code was introduced.

The Code of Civil Procedure deals entirely with the procedure before the French courts established in the French zone of Morocco. It is the most original of the Moroccan codes and shows in many respects a marked progress towards procedural simplification when compared with the French code. Rivière has summarized the main characteristics in the following three points: fewer intermediaries between the party and the court; written procedure before the Tribunals of First Instance and the Court of Appeal; and, finally, a more active role of the judge in the proceedings.[14]

The *dahir* on criminal procedure is not a code in any sense of the word. It provides mainly for the application of the French legislation and merely contains such modifications as were necessitated by local circumstances in Morocco. Its provisions apply only to the French courts in Morocco. According to article 14 of this *dahir,* the French courts in the protectorate apply the French Penal Code. All the codifications mentioned have been amended in detail since their enactment.

The substantive law embodied in the Code on Obligations and Contracts, in the Commercial Code, and in the Code on Maritime Commerce applies, theoretically at least, not only to Europeans but to all persons in Morocco. Therefore this legislation should also form the basis of the native secular jurisdiction. In practice,

[14] Cf. P.-L. Rivière, *Traités, codes et lois du Maroc,* 1925, III, 169–70.

however, this is not the case. The native courts have little knowledge of these new laws and hardly ever use them.[15]

THE ISLAMIC LAW

No detailed study of Islamic law can, of course, be offered in the framework of this volume.[16] A brief outline of its general nature will be given, however. The Islamic law is, in its character, quite different from either the continental European or the Anglo-American legal systems. The modern Western laws are secular; they are not integrated within a religious system, and religious principles have merely influenced some of their stipulations. Islamic law, on the other hand, is a religious law and forms part of the religion. It emanates from God and has its main basis in two religious sources, the *Koran* and the *Sunna*. The first contains divine revelations in God's own words, the second comprises the precepts of the Prophet. All actions of the Prophet, sayings as well as acts, fall into this category which forms an extremely important part of the Islamic law. The *Sunna* is also of direct divine origin since the Prophet was inspired by Allah. The individual precepts contained in this category are referred to as *hadith* (tradition). After the Prophet's death the number of traditions ascribed to Mohammed increased rapidly. It became necessary, therefore, to weed out fake traditions and to collect the genuine traditions. The first collection which contained traditions in a classified order was the *Sahih* of Al-Bukhari, published in the third century of the Hejira. *Sahih* means sound, signifying that the collection contains the sound traditions. A similar *sahih* was brought out at approximately the same time by a man named Muslim. However, the rules of the *Koran* and the *Sunna* soon became insufficient in view of the rapid expansion of Arab domination. Al-Medina, where the Prophet had lived, had been a rural community, and the legal needs of the Empire which had spread to Persia and Armenia and as far west as Spain were much more complex. To meet these changed conditions a way had to be found to integrate the necessary new legal prescriptions into the established system.

[15] Cf. H. Bruno, "La justice indigène au Maroc," *A.F.*, XLIII (1933), 76–77.

[16] A brief general discussion with references to further literature may be found in Joseph Schacht, *Islamic Law, Encyclopaedia of Social Sciences*, IV, 344–49. Recent French studies with special reference to North Africa are G. Surdon, *Précis élémentaire de droit musulman de l'école malékite d'Occident*, Paris, 1935, and G. H. Bousquet, *Précis élémentaire de droit musulman (Malékite et Algérien)*, Paris, 1935.

This was achieved by the development of jurisprudence (*fiqh*). Thus two secondary sources were created. One is the *ijmâ,* the unanimous opinion of the companions of the Prophet or their disciples or, according especially to the Shafite school, of the Moslem community; the second, the analogy (*qiyâs*). By this latter means, cases which came up were solved by applying the solutions of older analogous cases. In the second century of the Hejira, four legal schools came into being. They were founded respectively by Abu Hanifa, Malik, ash-Shafi, and Ibn Hanbal. From the teachings of these four schools stem the four orthodox Moslem rites: the Hanifite, Malikite, Shafite, and Hanbalite rite. Every orthodox Moslem has to belong to one of these rites. In North Africa the Malekite rite is prevalent. It has already been mentioned, however, that due to the Turkish influence Hanefites in small numbers may be found in the coastal cities of Tunisia and Algeria. The difference between the two rites is none too great and restricted mostly to details. In theory this Mohammedan jurisprudence established a complete system of law which also took in many subjects which are, in the Western countries, outside the strictly legal field, namely moral and ritual precepts.

In the daily practice many deviations from the rules of the religious law, the *shariâ,* based on the *Koran* and *Sunna,* and the jurisprudence, *fiqh,* soon became unavoidable; and though the state acknowledged the supreme rule of the *shariâ,* separate legislation was enacted especially to meet political and economic needs. This led in Tunisia and in Morocco, even before the French occupation, to a gradual curtailment of the jurisdiction of the religious judge, the *cadi,* and to the establishment of a secular jurisdiction which was in the hands of secular native officials. This situation still prevails today in the two countries, as has been shown above. In Algeria the jurisdiction of the *cadi* was not curtailed by the secular authorities before the French occupation as far as civil and commercial matters were concerned. Only criminal cases were exempt from his jurisdiction. This state of affairs is preserved in the Southern Territories but not in the North.

The creative period of Moslem jurisprudence officially came to an end with the establishment of the four great schools. However, many interpretative works have been written in later centuries. Codifications of Moslem law in the modern sense have only been attempted under European influence. Among the

great works on Malekite law used in North and West Africa, three have to be mentioned. They are the *Risâlah* or *Bâkûrat-al-Sa'd* of Ibn Abû Zayd, written in the tenth century; the *Mukhtaṣar* of Sîdî Khalîl, written in the thirteenth century; and the *Tuḥfat* of Ibn 'Âṣim, composed towards the end of the fourteenth or the beginning of the fifteenth century. This last-mentioned book constitutes a commentary to Sîdî Khalîl's work. These treatises still possess great practical value and are used by the courts. However, the development of the law has not stood still. Later studies and court decisions have, in practice, been material in forming the law as it is now applied, even though their importance may be considered inferior when compared with other legal systems.

After their occupation of North African territories, the French tried to solve the problem of the codification of Moslem law. As has been shown, a series of codes was enacted for Tunisia and for Morocco, the Tunisian codes applying to natives only. However, none of these codes covered those parts of the law which are most firmly under the rule of the religious law, namely, family relations, inheritance, and pious foundations. In Algeria an attempt was made to codify these portions of the law. The project was worked out under the direction of Marcel Morand, Dean of the Law School at the University of Algiers. A draft was published in 1916, but the code was never promulgated.[17] The draft consisted of four books regulating the personal status, inheritance, pious foundations, real estate, and the system of evidence. Although it never became law, the so-called *Code Morand* is very useful as a source of information, especially to the French courts charged with the application of Islamic law.[18]

Despite the fact that the religious jurisdiction is still based upon pure Islamic law, some innovations have been introduced. For one thing the principle of *res iudicata* has been established. This principle, defining that a case once finally decided cannot be brought to trial again, was very weakly established in Islamic law. Under European influence a firm system of appeals, especially in Morocco and Algeria, has been established and cases cannot be brought up again except for specific reasons. Another innovation is the introduction of judgments by default into the

[17] Marcel Morand, *Avant-projet de code présenté à la commission de codification du droit musulman algérien*, Algiers, 1916.

[18] On the French codification attempts in North Africa in general, cf. M. Morand, *Études de droit musulman et de droit coutumier berbère*, Algiers, 1931, pp. 271–92.

religious jurisdiction. These, likewise, were unknown originally in Islamic law.

THE CUSTOMARY LAW OF THE BERBER TRIBES

Local customs play only a very minor role among the Arabs and the Arabized Berbers in North Africa. However, among the semi-Arabized or non-Arabized Berbers in the Kabylia and in the interior of Morocco, rules of customary law are very important. It has to be stressed that these tribes are Moslems and may even be orthodox from a religious point of view. They use Moslem law fairly rarely, however, and apply it only where their customary law is silent. The customary law of the Berber tribes is called *âdat* or *orf* in Algeria, *azref* or *izref* in Morocco. *Adat* and *azref* signify the general custom, *orf* the local custom.[19] This customary law was codified by the Berbers themselves in only one respect, namely, with regard to rules of penal law. Penalties to be inflicted in cases where offenses against the law were committed were often laid down in writing in so-called *kanoun*. Only rarely do these *kanoun* contain modifications of general or local customary law. The language in which these *kanoun* are written is usually Arabic. No official codification of the Berber law has so far been attempted by the French. An excellent collection, however, of general and local Berber customary law was published in 1873 by A. Hanoteau and A. Letourneux under the title *La Kabylie et les coutumes kabyles*. Since then many monographs have been published on the subject of Berber law, but the work of these two authors is still regarded as fundamental and is also widely used by the French courts.[20]

SOURCES OF THE ABADITE LAW

It has already been stated above (see p. 99) that the Abadites follow their own law. No attempts at codification of this law have been made. There exists, however, a legal treatise which is considered as authoritative by the Abadites. This is the *Nil* whose author Abd-el-Aziz lived from the middle of the eighteenth to the beginning of the nineteenth century.[21] Penal law was laid down in a number of *kanoun*. Morand has pointed out

[19] *Ibid.*, pp. 274–75, 295–96.

[20] A brief discussion of Berber customs with further literature is given by Morand. *Ibid.*, pp. 293–316.

[21] Cf. E. Zeys, "Législation mozabite," *R.A.*, II (1886), reprint, pp. 45–46.

that the practical value of these *kanoun* is small since penal law is administered according to the French principles.[22]

CONFLICT OF LAWS

It is clear that in view of the coexistence of these various legal systems in the same territory conflicts of law must frequently arise.[23] These conflicts may often be solved according to general rules governing conflict of laws. This part of the legal science is referred to in France as *droit international privé* (private international law) and deals primarily with conflicts between local law and foreign laws. However, the principles are by analogy also applied where two local laws, e.g., protectorate law and Berber customary law, conflict. In some instances special prescriptions for the solution of such conflicts have been laid down by the legislation. The *dahir* regulating these problems in Morocco has already been discussed above.[24] This *dahir,* however, deals only with conflicts between French or foreign law on the one hand and protectorate law on the other. In Tunisia no special decree of this sort exists. Conflicts arising between French or foreign law and Tunisian law have to be decided according to the general rules of private international law. Conflicts arising out of the application of local native laws in Tunisia and Morocco have likewise to be solved according to the general rules of private international law and equity since no special legal provisions are made for their solution. In Algeria, however, some rules have been laid down for the decision of conflicts arising between native laws. The decree of August 27, 1874, states the following principle in its article 3. If a conflict of laws arises between Arabs and Kabyles, the law to be applied in real-estate cases is the law of the place where the parcel of land is situated. If the case concerns personal property or other personal matters, the law of the place where the contract was concluded is applied. Where no contract was concluded, the legal situation is determined by the place where the event occurred from which the obligation originates. The parties may, how-

[22] Morand, *op. cit.,* p. 280.

[23] On the problems of conflict of laws in colonial areas in general, cf. A. A. Schiller, "Conflict of Laws in Indonesia," *Far Eastern Quarterly,* I (1942), 31–47; especially pp. 36–37. The situation in Algeria and the conflict of laws in Moslem law have been treated by Morand, *op. cit.,* pp. 99–148. Cf. also under "Conflit" in *Répertoire Tilloy,* Paris, n.d., for the solution of conflicts in Algeria and Tunisia.

[24] Cf. p. 39.

ever, indicate to what law they want to submit their case. These rules are applicable only to the Kabylia. For the civil zone of Algeria, special provisions were made in the decree of April 17, 1889. There the principle was stated that, with regard to personal status and inheritance, the Moslems are subjected to the law of their country of origin or to the rite to which they belong. In real-estate cases, the law of the place where the land is situated has to be applied. In instances where these rules do not offer any solutions, one has to fall back upon the general principles of private international law.

Moslem law also has established rules governing the conflict of laws. Historically important among them is the principle that non-Moslems belonging to the same religion, e.g., two Christians, may be judged by their own judges. This rule has facilitated the establishment of the capitulations. The other rules governing conflicts between Islamic and foreign law have little practical interest for North Africa, since a non-Moslem hardly ever will come before a Moslem court and the French courts will usually apply the French rules. Among the principles governing conflicts between different rites, it is interesting to note that the defendant has the choice of the rite to be applied to the suit if the parties belong to different rites.

GUIDE TO LEGAL SOURCES

Most of the laws and regulations for France's North African possessions can be found in French sources, published either in France or in the possessions.[1] The French codes which might be needed in Algeria and in Tunisia have all been published in so-called "annotated editions," that means they contain after each article references to the most important decisions and also to later statutes. The current legislation as far as enacted by the central French authorities may be found in the *Journal officiel* or in another official publication which, however, has not appeared for some time, the *Bulletin des lois* (Bulletin of Laws). Both publications are indexed but more difficult to use than the collections of laws put out by private publishers. Among these the most widely used are J.-P. Duvergier, *Collection complète des lois et décrets d'intérêt général,* and Dalloz, *Bulletin législatif,* both published monthly. These collections contain the enactments in chronological order. Codes and statutes have been published together in several large editions. These collections usually bring codes and international treaties in one volume and the so-called *lois usuelles* (laws in use) in another. There one may conveniently find the statutes of general application, as far as they are still in force. The order is usually chronological. A fairly recent one among these comprehensive collections is the one by P. Colin, *Codes et lois pour la France, l'Algérie et les colonies,* Paris, 1925, supplements to 1928. These works contain only enactments by the central French authorities. It has further to be mentioned that sometimes regulations for overseas possessions which do not seem to have any apparent general interest, such as minor territorial reorganizations, are left out altogether.

The current legislation for Algeria, Tunisia, and Morocco, both legislation enacted in France and statutes enacted in the possessions, may be most conveniently found in the *Revue algérienne, tunisienne et marocaine de législation et de jurisprudence* published annually since 1885. It consists of three main parts: the first contains articles on different legal subjects, generally very useful; the second part lists decisions of the courts; and the third part lists the legislation of the period under report. More important enactments are reproduced in full. The actual division in parts has varied somewhat. The first two parts have always the same contents; the legislation, however, has been divided into several parts. In the older volumes, Algeria and Tunisia were treated together and Morocco separately. More recently each of the three territories has been handled separately. Although the *Revue* con-

[1] A critical bibliography of French law was published by E. M. Borchard-G. W. Stumberg, *Guide to the Law and Legal Literature of France,* Washington, D. C., 1931. This book deals exclusively with metropolitan French law.

tains most of the legislation enacted, it, too, sometimes omits minor regulations which, however, may have importance for special questions.

Collections of codes and statutes also exist for the North African territories. For Morocco, P.-L. Rivière has issued a collection *Traités, codes et lois du Maroc* in three volumes, 1923–25, with yearly supplements. The collection is very good and contains, besides the statutes, brief notes explaining the more important laws which are often very helpful. For Algeria, a somewhat similar collection was published by R. Estoublon et A. Lefébure, *Code de l'Algérie annoté,* 2 vols. 1896–1905, supplements to 1915. For Tunisia, the collection by Maurice Bompard, *Législation de la Tunisie,* 1888, supplements to 1896, contains the older legislation. A more modern collection continued by supplements to 1912 is the one by E. Zeys, *Code annoté de la Tunisie,* 1901. More recently loose-leaf collections of legal materials have appeared. By exchanging the pages they can be kept well up to date. They are the so-called *Juris classeur* editions and treat different legal matters under subject headings. For Morocco, such a collection was published by L. Milliot and J. Rovel, *Juris classeur marocain.* For Tunisia and Algeria, a loose-leaf collection of that sort exists in the second edition of the so-called *Répertoire Tilloy* (full title: R. Tilloy, *Répertoire alphabetique de jurisprudence, de doctrine et de législation algériennes et tunisiennes*) published by L. Milliot and G. Rectenwald. These collections do not contain the text of enactments but short encyclopedic articles.

Decisions of the metropolitan courts may best be found in one of the large private collections, the *Recueil périodique et critique* published by Dalloz and usually quoted as *D(alloz) P(ériodique)*. It is published monthly and contains four principal parts: decisions of the Court of Cassation, decisions of Courts of Appeal and of Tribunals, decisions of the *Conseil d'état* and other administrative tribunals, and finally the current legislation. A fifth part includes short summaries of decisions. Of importance for the North African areas are sometimes decisions of the *Cour de cassation* and of the *Conseil d'état.* Quotations of this publication give usually year, part, and page. Thus a decision of the *Conseil d'état* reported on page 530 of the 1935 volume would be cited like this: *D.P.* 1935.3.530. Another collection published by Dalloz is the *Recueil hebdomadaire de jurisprudence* which appears weekly and contains decisions as well as short articles on legal matters. It is quoted *D(alloz) H(ebdomadaire)*, giving year and page. A collection similar to that of the *Dalloz Périodique* is the *Recueil général des lois et des arrêts de Sirey,* usually cited as *R(ecueil) S(irey)* with year, part, and page. It, too, consists of four parts. The first three parts have the same contents as the *Dalloz Périodique,* while the fourth part contains foreign decisions. The legislation is reported in an appendix, published separately, *Lois annotées.* There is also a supplement containing summaries of court decisions. A special feature of all these collections is that decisions and more important legislative acts are followed by brief notes in which experts discuss the problems raised. These notes are often of

great value. The most convenient collection of Moroccan, Tunisian, and Algerian decisions is contained in the *Revue Algérienne* as stated before. They are usually quoted as *R(evue) A(lgérienne)*, with year, part, and page. Besides, there exist collections of decisions of Algerian, Tunisian, and Moroccan courts which are published periodically. A list of the important ones may be found in the bibliographies at the beginning of Girault-Milliot, *L'Algérie*, seventh edition, and *La Tunisie et le Maroc*, sixth edition.

Case books which contain cases dealing with certain related subject matters are unknown in France. Their place is taken by textbooks which are sometimes very voluminous and treat a larger portion of the law, e.g., civil law, commercial law, or criminal law, etc. Of great help sometimes are legal encyclopedias and dictionaries. Important among these are the *Répertoire général alphabétique*, edited by E. Fuzier-Herman and others, and the *Répertoire pratique*, published by Dalloz. Both collections consist of many volumes and supplements which keep them more or less up to date. At least for Algeria, valuable material can be found in them. A brief law dictionary corresponding in size approximately to Bouvier's *Law Dictionary* is the *Dictionnaire pratique*, published by Dalloz. The collection of the *Juris classeur* has already been mentioned.

This outline on how to find legislation and cases relating to the French North African possessions, by necessity, has to be brief and sketchy. The student, however, who has to work in the field will find further material fairly easily. Special emphasis was laid in compiling this list upon the availability in America of the works discussed. Most of those referred to can be found in the law libraries of the large universities or in the Library of Congress. The number of treatises on overseas possessions in general and the North African regions in particular is large. Some of them have been quoted in the notes. The comprehensive works usually contain good bibliographies. Two works which have not been cited in the notes should be mentioned here, however. One is E. Larcher-G. Rectenwald, *Traité élémentaire de législation algérienne*, third edition, Paris, 1931; the other, L. Rolland and P. Lampué, *Législation et finances coloniales*, Paris, 1933. This book deals primarily with the colonies. It contains very brief chapters on the administration and the judicial administration of Algeria, Tunisia, and Morocco. More extensive are the chapters dealing with finances and taxation, also the parts dealing with North Africa. The book is valuable for studies on budgetary matters and taxation.

Appendix

THE TREATIES ESTABLISHING THE FRENCH NORTH AFRICAN PROTECTORATES

TREATY OF BARDO OF MAY 12, 1881

The Government of the French Republic and that of His Highness the Bey of Tunis wishing to prevent forever the renewal of disorders which occurred recently at the frontiers of the two states and on the seaboard of Tunisia, and desiring to strengthen the old relations of friendship and good neighborliness, have resolved to conclude a convention to that end in the interest of the two high contracting parties.

In consequence thereof, the President of the French Republic has nominated as his plenipotentiary Général Bréart, who has reached an accord with His Highness the Bey on the following stipulations:

ARTICLE ONE

The treaties of peace, friendship, and commerce, and all other conventions actually existing between the French Republic and His Highness the Bey of Tunis are expressly confirmed and renewed.

ARTICLE TWO

In order to facilitate for the Government of the French Republic the accomplishment of the measures which it has to take in order to achieve the goal which the high contracting parties have set for themselves, His Highness the Bey of Tunis consents to the occupation by the French military authority of those areas which it considers necessary in order to assure the re-establishment of order and the security of the frontiers and the seaboard.

This occupation shall cease if and when the French and Tunisian military authorities have acknowledged, by mutual agreement, that the local administration is in a position to guarantee the maintenance of order.

ARTICLE THREE

The Government of the French Republic takes over the obligation to lend constant support to His Highness the Bey of Tunis against all dangers which may threaten the person or the dynasty of His Highness or may compromise the tranquillity of his states.

ARTICLE FOUR

The Government of the French Republic guarantees the execution of the treaties actually existing between the Government of the Regency and the different European powers.

ARTICLE FIVE

The Government of the French Republic shall be represented with His Highness the Bey of Tunis by a Minister Resident who will supervise the execution of the present agreement and will be the intermediary in the relations between the French Government and the Tunisian authorities with regard to all matters common to the two countries.

ARTICLE SIX

The diplomatic and consular agents of France in foreign countries are charged with the protection of the interests of Tunisia and the nationals of the Regency.

In return, His Highness the Bey pledges himself not to conclude any agreement of an international character without having informed the Government of the French Republic and without having reached an understanding with it beforehand.

ARTICLE SEVEN

The Government of the French Republic and the Government of His Highness the Bey of Tunis shall fix, by mutual agreement, the bases for a financial organization of the Regency which will be of such a nature as to insure the service of the public debt and to guarantee the rights of the creditors of Tunisia.

ARTICLE EIGHT

A contribution of war (*contribution de guerre*) shall be imposed upon the unsubdued tribes of the frontier and the seaboard. A final agreement shall determine its figure and the method of recovery, for which the Government of the Bey undertakes the responsibility.

ARTICLE NINE

In order to protect the Algerian possessions of the French Republic against the smuggling of arms and munitions of war, the Government of His Highness the Bey of Tunis promises to prohibit all importation of arms and munitions of war by way of the isle of Djerba, the port of Gabes, and the other Southern Tunisian ports.

ARTICLE TEN

The present treaty shall be submitted to ratification by the Government of the French Republic, and the instrument of ratification shall be transmitted to His Highness the Bey of Tunis with the least possible delay.

Casr-Saïd, March 12, 1881

(L.S.) Mohamed Es Sadok Bey
(L.S.) Général Bréart

TREATY OF LA MARSA OF JUNE 8, 1883

His Highness the Bey of Tunis taking into consideration the necessity of improving the internal situation of Tunisia according to the conditions foreseen in the treaty of May 12, 1881, and the Government of the Republic wanting to respond to this desire and to consolidate also the amicable relations fortunately existing between the two countries, have agreed to conclude a special convention to that effect. As a consequence, the President of the French Republic has nominated as his plenipotentiary M. Pierre-Paul Cambon, his Minister Resident in Tunisia, Officer of the Legion of Honor, possessor of the *Haïd* and the Grand Cross of Nicham Iftikar, etc., etc., who, after having communicated his plenary powers, which were found to be in good and due form, has agreed with His Highness the Bey of Tunis upon the following dispositions:

ARTICLE ONE

His Highness the Bey of Tunis, in order to facilitate for the French Government the accomplishment of its protectorate, pledges to undertake the administrative, judicial, and financial reforms which the French government shall consider useful.

ARTICLE TWO

The French Government shall guarantee, at a time and under conditions which seem best to it, a loan to be floated by His Highness the Bey for the conversion and the repayment of the consolidated debt up to the sum of 125,000,000 francs, and of the floating debt up to a maximum of 17,550,000.

His Highness the Bey pledges not to contract in the future any loan on account of the Regency without authorization by the French Government.

ARTICLE THREE

From the revenues of the Regency, His Highness the Bey will deduct: (1) the sums necessary to assure the service of the loan guaranteed by France; (2) the sum of 2,000,000 piasters (1,200,000 francs) constituting his civil list; the surplus of the revenues to be applied to the expenses of the administration of the Regency and to the reimbursement of the costs of the protectorate.

ARTICLE FOUR

The present arrangement confirms and completes as far as necessary the treaty of May 12, 1881. It does not modify the dispositions previously established for the regulation of the contributions of war.

ARTICLE FIVE

The present convention shall be submitted to ratification by the Government of the French Republic, and the instrument of the said rati-

fication shall be transmitted to His Highness the Bey of Tunis with as brief a delay as possible.

In witness whereof, the undersigned have drawn up the present instrument and have affixed their seals thereto.

Done at La Marsa, June 8, 1883.

(*L.S.*) *Ali Bey*
(*L.S.*) *Paul Cambon*

TREATY OF FEZ OF MARCH 30, 1912

The Government of the French Republic and the Government of His Sherifian Majesty, desiring to establish in Morocco a regular administration (*régime régulier*) founded upon internal order and general security and one which will permit the introduction of reforms and assure the economic development of the country, have agreed upon the following dispositions:

ARTICLE ONE

The Government of the French Republic and His Majesty the Sultan have agreed to institute in Morocco a new regime which will bring about the administrative, judicial, educational, financial, and military reforms which the French Government shall consider necessary to introduce in the Moroccan territory.

This regime shall safeguard the religious situation, the respect for and the traditional prestige of the Sultan, the exercise of the Moslem religion and of the religious institutions, notably that of the *Habous.* It shall include the organization of a reformed Sherifian *Makhzen.*

The Government of the Republic shall negotiate with the Spanish Government with regard to the interests of that Government resulting from its geographic position and its territorial possessions on the Moroccan coast.

The city of Tangier shall likewise preserve the special character which has been accorded to it and which will determine its municipal organization.[1]

ARTICLE TWO

His Majesty the Sultan agrees from now on that the French Government proceed, after having informed the *Makhzen,* with those military occupations of Moroccan territory which it shall consider necessary for the maintenance of order and the security of commercial transactions, and that it exercise all police powers on land and in Moroccan waters.

ARTICLE THREE

The Government of the Republic undertakes the obligation of lending constant support to His Sherifian Majesty against all dangers which

[1] Tangier was an "international city" with an international municipal administration until its occupation by Spain in 1940. Cf. p. 26.

may threaten his person or his throne or may compromise the tranquillity of his states. The same support shall be lent to the heir to the throne and to his successors.

ARTICLE FOUR

The measures which the new protectorate system will necessitate shall be enacted, upon proposal of the French Government, by His Sherifian Majesty or by those authorities to whom he may delegate his powers. This rule shall apply equally to new regulations and to modifications of existing regulations.

ARTICLE FIVE

The French Government shall be represented with His Sherifian Majesty by a Commissioner Resident General, depository of all the powers of the Republic in Morocco, who shall supervise the execution of the present agreement.

The Commissioner Resident General shall be the sole intermediary of the Sultan with the foreign representatives and in the relations which these representatives entertain with the Moroccan Government. He shall be charged especially with all the questions pertaining to foreigners in the Sherifian Empire. He shall have the power to approve and promulgate, in the name of the French Government, all the decrees enacted by His Sherifian Majesty.

ARTICLE SIX

The diplomatic and consular agents of France shall be charged with the representation and the protection of Moroccan subjects and interests abroad.

His Majesty the Sultan pledges not to conclude any agreement of an international character without previous consent of the Government of the French Republic.

ARTICLE SEVEN

The Government of the French Republic and the Government of His Sherifian Majesty shall establish, by mutual agreement, the bases for a financial reorganization which, while respecting the rights conferred upon the holders of titles of Moroccan public loans, will permit the guarantee of the engagements of the Sherifian treasury and the regular collection of the revenues of the Empire.

ARTICLE EIGHT

His Sherifian Majesty pledges not to contract in the future, directly or indirectly, any public or private loan or to grant any concession whatsoever without authorization from the French Government.

ARTICLE NINE

The present convention shall be submitted to ratification of the Government of the French Republic, and the instrument of the said ratification shall be transmitted to His Majesty the Sultan with as brief a delay as possible.

In witness whereof, the undersigned have drawn up the present instrument and have affixed their seals thereto.

Done at Fez, March 30, 1912 (Rebiah 11, 1330)

(*L.S.*) *Regnault*
(*L.S.*) *Moulay Abd-el-Hafid*